Supreme Court, U.S.
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In the

Supreme Court of the United States

JOSEPH SINGER, Individually and on Behalf of Others Similarly Situated; CHARLES LINDORFER, Individually and on Behalf of Others Similarly Situated; ROSALIO AMARO; CARL B AMMANN; JAMES A BAKER; ET AL,

Petitioners,

v.

CITY OF WACO, TEXAS

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

R. John Cullar
Counsel of Record
Mills, Cullar & McLeod, LLP
801 Washington Ave.
Suite 217
Waco, TX 76701
(254) 753-1991
(254) 753-0244
Attorneys for Petitioners

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦USSCINFO.COM

94 pp

QUESTIONS PRESENTED

1. The Fair Labor Standards Act requires employers to pay covered employees who work more than 40 hours in any workweek – or, specific to this case, more than 106 hours in a 14-day work period – overtime pay for those extra hours. 29 U.S.C. 207, 215(a). The first question presented is:

> Whether an employer's liability for its violations of the FLSA overtime provisions in certain work periods may be offset by the employer's voluntary payments in excess of the statutory minimum in other work periods during the limitations period.

2. The Fair Labor Standards Act requires overtime to be computed at a rate not less than one and one-half times the regular rate at which an employee is employed. 29 U.S.C. 207(a). The "fluctuating workweek" method is one method of calculating an employee's regular rate, but requires a clear mutual understanding between the employee and employer that the work period salary will be compensation for all hours actually worked in the work period. 29 C.F.R. 778.114(a). The second question presented is:

> Whether, in calculating damages against an employer found to have violated the FLSA, a court may unilaterally impose the fluctuating workweek method to calculate an employee's regular rate in the absence of a clear mutual understanding between the parties.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Including the parties named in the caption of this Petition, the parties are:

Petitioners: Joseph Singer, Charles Lindorfer, Rosalio Amaro, Carl B. Ammann, Tim Anderson, James A. Baker, Michael L. [illegible]ll, Chris Ballew, James Banister, Rob Barlow, Ulysees C. Barnes, Sr., Dewey F. Barnett, William Gerald Bass, Robert M. Beechner, Loy T. Beene, Jr., Robin Bergerson, Louis E. Bittle, Shane C. Bivens, Allan J. Blahuta, Lowry W. Bonner, Freddie Bottoms, William T. Brandon, Lawrence L. Bright, William C. Buchanan, Thomas E. Buchta, Matthew Carey, Shon Cavett, Clinton L. Coates, Jr., Thomas L. Cockrell, Mary Coleman, Independent Executrix of the Estate of James A. Coleman, III, Jerry E. Collier, Kelley Brent Compton, Ronnie Conder, William L. Conner, Joe P. Cook, James C. Cooper, Robert Covey, Toby Craig, William J. Crow, Jay Cunningham, Scott Cupit, Gary L. Davis, John M. Daws, Keller Allen Dennis, Hershel G. Doss, Albert D. Drakes, Sr., Wade Durbin, Billy L. Eary, Roger S. Fedro, Jerry Fikes, Scott Garner, Jerry W. Gautier, Tom R. Gent, J. P. Germany, Neal Gibson, Sidney B. Gilliam, David Golden, Dalton Gooden, Michael R. Graham, Gerald Groppe, Greg Groppe, Kevin Groppe, J. T. Guthrie, Billy J. Hammond, David C. Harris, Tracy C. Hawthorne, Raymond Helona, Derek Henry, Larry James Hoelscher, Dave K. Holmes, Ramonell James, Raymond L. Jaska, Jessie Johnson, surviving spouse of Cardell D. Johnson, Sr., Jon M. Johnson, Michael L. Johnson, Clinton E. Johnston, James W. Jordan, Duane Kadina, Wade R. Kaminski, Jason Keiningham, Nelson W. Kelinske, Patrick M. Kerwin, Gregory L. Kistler, Stanley G. Knight, Edward R. Kocian, Joe Kreder, Daleforde Langston, Gary Lee, Keith D. Lee, Michael

Lenart, John W. Linda, Clarence L. Ling, Gregory A. Lippe, George W. Litton, Marcos Lozano, Scott Luepke, Gernice T Lykins, Dusty Lynch, Rick Lynch, Darrel Lyons, James W. McKee, J. D. McPherson, Daniel L. McSpadden, Danny Machac, Larry Joseph Maddox, Braden A. Martin, James Mary, Shawn Mason, Terry E. Mayer, Jimmie Mauppin, Dean Mendez, Darren Meyer, David Michalewicz, Joseph B. Molina, James C. Monroe, William C. Monroe, Charles W. Montroy, Michael Paul Nichols, Jesse Niemeyer, Larry E. Nolen, Randy Nors, Jeremey James Nunes, Gary Owen, Frank L. Packwood, Bobby Pankonien, Jerry Dale Pankonien, Ralph B. Patrick, George W. Paulk III, Chris Pechacek, Donald Penoli, Adam Perry, Douglas S. Phillips, Melvin Darren Qualls, Berry Raley, Mikeal Ready, Richard T. Reid, Steven C. Reinke, Jimmie D. Robinson, Lester D. Robison, Benjamin Samarripa, Ca[illegible]in L. Sanders, David Sauer, Dennis Schroeder, Frank Scott, James A. Seay, Sr., James A. Seay, Jr., Paul E. Simmons, Demetris Smith, Jesse Smith, Christopher Sobin, Henry Wayne Sovey, Michael Shane Spann, Kenneth Stoermer, Bobby R. Teague, Shannon A. Teal, Darrell Townsend, Brian Treat, Brooks Tucker, Steve C. Tull, Richard Tupy, Kenneth Uptmor, Alfonce L. Urbanovsky, Billy Vaden, James R. Varano II, L.W. Vaughn, Patrick Veselka, John S. Villanueva, Kevin J. Vranich, Raymond Wachsmann, David Walsleben, Ronald W. Walts, Wilburn C. Whorton Jr., Mike Westerfield, James E. Wetterman, Otis Lee Williams, Richard Glen Wilson, Sherril Don Wood, Charles Yarber, Don C. Yeager, and Royce Zatopek. All petitioners are individuals or the representatives of the estates of individuals, as noted.

Respondent: The City of Waco, Texas, is a municipal corporation organized and existing under the laws of the State of Texas.

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Petitioners Joseph Singer, Charles Lindorfer, and 178 other individually named members of the Waco Fire Department, plaintiffs in the District Court and appellants/cross-appellees in the Court of Appeals, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a - 31a) is reported at 324 F.3d 813. The judgment and relevant orders of the district court (App. 34a - 56a) are unreported.

JURISDICTION

The opinion of the court of appeals was issued on March 27, 2003. App. 1a - 31a. The court of appeals denied petitioners' request for a rehearing *en banc* on April 22, 2003. App. 32a-33a. This petition is timely in that petitioners have filed it within 90 days of April 22, 2003. The Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Fair Labor Standards Act, 29 U.S.C. 201, et seq., and the regulations promulgated relative thereto by the Department of Labor. Specifically, 29 U.S.C. 207, 218(a), and 29 C.F.R. 778.113, .114 are relevant to the determination of this petition. The

pertinent provisions of these statutes and regulations are:

> 29 U.S.C. 207 Maximum hours
>
> (a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions
>
> (1) Except as otherwise provided in this section, no employer shall employ any of his employees *** for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.
>
> ***
>
> 29 U.S.C. 218 Relation to other laws
>
> (a) No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing *** a maximum workweek lower than the maximum workweek established under this chapter . . . . ***
>
> 29 C.F.R. 778.113 Salaried employees – general.
>
> (a) Weekly salary. If the employee is employed solely on a weekly salary basis, his regular hourly rate of pa, on which

time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate. ***

(b) Salary for periods other than workweek. Where the salary covers a period longer than a workweek, such as a month, it must be reduced to its workweek equivalent. A monthly salary is subject to translation to its equivalent weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks).***

29 C.F.R. 778.114 Fixed salary for fluctuating hours.

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at

a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) ***

(c) The "fluctuating workweek" method of overtime may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek

> and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the "fluctuating workweek" method of overtime payment are present, the Act, in requiring that "not less than" the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. ***

STATEMENT

1. Sections 7 and 15(a)(2) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 207, 215(a), require employers to pay covered employees who work more than 40 hours in any workweek overtime pay for those extra hours. Employees are entitled to overtime compensation according to the general rule unless the employer proves that one of the many exemptions applies. *Vela v. City of Houston*, 276 F.3d 659, 666 (5th Cir. 2001). Employees of a public agency that are engaged in fire protection activities are exempt from the general rule (the "207(k) exemption"). *Id.*, 29 U.S.C. 207(k).

In general, FLSA overtime payments must be made promptly, such that "overtime compensation" earned in a particular (work period)[1] must be paid on the regular payday for the period in which such (work period) ends." 29 C.F.R. 778.106; *see also*, 29 C.F.R. 778.103 (directing employers to pay overtime due on a [work period] basis); 29 C.F.R. 778.104 (stating that an employer cannot average the number of hours worked over two [work periods] in order to avoid paying overtime). Section 15(a)(2) of the FLSA makes it unlawful for any person "to violate *** section 207 of this title." 29 U.S.C. 215(a)(2).

Because the jury in the instant case found that the City had established a 14-day work period under the 207(k) exemption for its fire fighters, petitioners were not entitled to overtime until after they had worked 106 hours in a 14-day work period. App. 6a; 29 C.F.R. 553.230. Thus, petitioners were entitled to overtime compensation at the rate of one and one-half their "regular rate" of pay for all hours worked over 106 in any given work period. 29 C.F.R. 553.232.

Petitioners sued the City for the damages incurred in two-thirds of the work periods in the limitations period, work periods in which the City willfully violated the FLSA. App. 11a. In those work periods during the limitations period where the City met or exceeded the statutory minimums, petitioners had no complaint. The Fifth Circuit panel held that the City's

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[1] 29 C.F.R. 553.233 provides that the rules in part 778 "are applicable to employees for whom the 7(k) exemption is claimed when the overtime compensation is provided in cash wages. However, whenever the word 'workweek' is used in part 778, the words 'work period' should be substitute."

voluntary payments in excess of the statutory minimums in one-out-of-every-three of the limitation period's work periods should be viewed as "pre-payments" of the City's liability for the work periods in which the City was found to have violated the FLSA. App. 22a. Thus, the Fifth Circuit panel allowed the City's voluntary payments in excess of the statutory minimums in work periods about which petitioners had no complaint to offset the City's liability in work periods where the jury found the City willfully violated the FLSA. App. 23a.

The first question in this case concerns whether voluntary payments in excess[2] of the amount required by the FLSA which are paid to employees for work done in certain work periods relieve the employer from the obligation to compensate the employee for statutorily deficient payments in other work periods. Stated otherwise, this case concerns whether damages in an FLSA case should be calculated on a work period basis, or instead under an aggregate methodology. Under the work period method, damages are calculated only for those work periods during the limitations period where the statute was violated. Under the aggregate method, an employer may carry amounts voluntarily paid in excess of the statutory minimums in certain work periods during the limitations period forward or backward, whenever paid, against any FLSA overtime that is owed for the statutorily violative work periods.

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[2] The word "excess" as used herein with regard to payment of wages or overtime refers to payments which legally exceed the statutory requirements for both straight and overtime compensation for a given work period, so as to present the question whether the excess payment for any one period may be carried over and credited against the underpayment of overtime compensation due in other periods.

The second question in this case concerns the proper method of calculating the regular rate of employees who have not agreed to the compensation scheme unilaterally adopted by the court in awarding damages.

2. 180 members and former members of the Waco Fire Department ("WFD") brought suit in federal district court against the City of Waco to recover unpaid overtime compensation pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201, et seq , and Tex.Loc.Gov't. Code 142.0015. App. 2a, 35a. Petitioners were separated into two categories: (1) members of the WFD engaged in fire suppression ("fire fighters"); and (2) members of the WFD employed as fire alarm operators. App. 36a. Petitioners alleged the City used formulas to calculate their regular and overtime rates of pay which violated state and federal law, and that the City failed to pay them for all overtime hours worked in certain work periods. The City admitted its pay practices violated the statutes for both the fire fighters and fire alarm operators.[3] App. 2a, 54a. The issue of damages was bifurcated from the liability issues, with a jury determining liability issues and the district court determining damages. App. 35a.

The jury found the City: (1) established a 14-day work period[4] under 29 U.S.C. 207(k) for its fire

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[3] For the damages awarded by the district court to any petitioner for time spent working as a fire alarm operator during the limitations period, petitioners did not appeal the damages award. However for the petitioners who worked both as a fire fighter and a fire alarm operator during the limitations period, those petitioners have active claims identical to the fire fighters. *See* App. 25, *n.* 1.

[4] For a 14-day work period, the maximum non-overtime

suppression employees (App. 35a); and (2) the City willfully failed to pay both categories of petitioners overtime under the statutes. *Id.* Following the damages hearing, a final judgment was entered on September 14, 2001. App. 34a-51a. On October 25, 2001, the district court granted in part and denied in part plaintiffs' motions to amend findings of fact and conclusions of law and to alter or amend the judgment. App. 52a-56a.

Petitioners appealed relative to the district court's findings of fact and conclusions of law concerning the offsets and the proper formula for determining the fire fighters' regular rates; petitioners did not appeal the jury verdict. App. 2a. The City filed an appeal and cross-appeal. *Id.* On March 27, 2003, the Fifth Circuit panel issued its opinion, and affirmed the judgment of the district court. App. 1a-31a. Petitioners' petition for rehearing *en banc* was denied on April 22, 2003. App. 31a-33a.

Petitioners sought a rehearing – and now seek certiorari – only as to Parts VI and VII of the panel's opinion. App. 15a-23a. Part VI affirmed the district court's formula for computing the fire fighters' regular and overtime rates. Part VII affirmed the district court's order that the amounts which the City voluntarily paid in excess of the statutory minimums in certain work periods during the limitations period about which petitioners did not file suit were to offset the City's liability in the work periods where it was found to have willfully violated the statutes. As to Parts I, II, III, IV, V, and VIII of the panel opinion, petitioners had no complaint and did not seek rehearing, nor do petitioners

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hours allowed is 106. 29 C.F.R. 553.230.

seek review of such parts in this petition for certiorari.

3. Each petitioner worked in either fire suppression or as a fire alarm operator (or both) at some point in time from September 28, 1995 through trial.[5] App. 36a. The fire fighters worked alternating shifts which required them to be on-duty for 24 hours straight, followed by 48 hours off-duty, before the cycle repeated itself. App. 3a. In every six-week period, each fire fighter was scheduled to work 120 hours in one 14-day period, 120 hours in another 14-day period, and 96 hours in a third 14-day period. *Id.* The fire fighters frequently worked shifts in addition to their scheduled hours. PX 31.

Throughout the limitations period, the City paid overtime compensation at one-and-one-half times an artificial hourly rate known as the "2,912 rate" to determine the hourly and overtime rates for the fire fighters. App. 3a. The City unilaterally and voluntarily paid the fire fighters for 106 hours of regular time and 6 hours of overtime at time and one-half each 14-day work period, irrespective of whether they worked 120 hours or 96 hours in the work period, in an attempt to average the fire fighters' hours between work periods. *Id.* In all work periods where the fire fighters worked 120 hours and were paid only for 106 regular hours and 6 hours of overtime, the City failed to pay them for 8 hours of overtime work. *Id.* In any work period where the fire fighters worked more than their scheduled hours –

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[5] As correctly noted in the panel opinion, the liability period for a claim pursuant to Tex.Loc.Gov't Code, ch. 142, is four years. App. 27a. Because the jury found the City willfully violated the FLSA, the limitations period for the FLSA claims was three years prior to the filing of the suit. 29 U.S.C. 255(a). *Id.*

whether in a 96 or 120 hour work period – the City paid them overtime at time and one-half for all unscheduled hours worked, without recalculating their regular rate. *Id.* The fire fighters never agreed to receive equal paychecks, nor to have their annual pay divided by 2,912 to determine their regular rate. App. 27a. The City admitted it had not adopted a fluctuating method (29 C.F.R. 778.114) for calculating plaintiffs' pay, and it is not disputed that the City's use of "2,912" to calculate petitioners' regular rate and its averaging of the fire fighters' hours between work periods violated the FLSA. App. 2a, 54a.

In calculating damages, the district court held – and the panel affirmed – that the fire fighters' work period salaries were to be divided by all hours *actually* worked in the work period to determine their regular and overtime rates (App. 16a, 43a); the City now pays the fire fighters pursuant to the court-mandated formula. App. 35a. The district court also ordered – and the panel affirmed – that any amounts which the City voluntarily paid in excess of the statutory minimums in any work period during the limitations period were to be credited against the statutorily violative underpayments made in the other work periods. App. 19a. Because of the regular rate formula imposed on the fire fighters, because of the allowance of offsets, and irrespective of the fact that the City violated the FLSA in two-out-of-every-three work periods in the limitations period for each of the fire fighters, 129 fire fighter petitioners received no damage award at all. App. 30a.

REASONS FOR GRANTING THE PETITION

1. The decision of the Fifth Circuit panel relative to the offset of damages is in direct conflict with *Roland Electrical Co. v. Black*, 163 F.2d 417, 420 (4th Cir. 1947). The panel opinion also is a significant departure from the accepted and usual course of judicial and administrative interpretations of the FLSA regarding offsets and "prepayment plans," thus calling for the exercise of this Court's supervisory power.

a. Without citation to any authority supporting its position, the Fifth Circuit panel held "that the district court did not err in offsetting the overpayments paid to the fire fighters in some work periods against the shortfalls in other work periods." App. 23a. To reach such conclusion, the panel attempted to avoid prior Fifth Circuit authority (App. 29a, *n.* 9), which stated, "set-offs against back pay awards deprive the employee of the "cash in hand" contemplated by the (FLSA), and are therefore inappropriate in any proceeding brought to enforce the FLSA minimum wage and overtime provisions." *Brennan v. Heard*, 491 F.2d 1, 4 (5th Cir. 1974).[6]

Having dispatched its own authority, the Fifth Circuit panel completely failed to address the Fourth Circuit's holding in *Roland Electrical Co. v. Black*:

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[6] *Brennan* further held that, "the FLSA decrees a minimum unconditional payment and the commands of the Act are not to be vitiated by an employer, either acting alone or through the agency of a federal court." *Brennan v. Heard*, 491 F.2d at 4. The panel opinion clearly vitiated the commands of the FLSA to pay overtime when due (29 U.S.C. 207, 215(a)) in this proceeding brought to enforce FLSA overtime provisions.

> (P)ayments in excess of the amount required by the (FLSA) to an employee for work performed in certain weeks do not relieve the employer from the obligation to compensate the employee for deficiencies in other weeks ....

Roland Electrical Co. v. Black, 163 F.2d at 420, *cert. denied*, 333 U.S. 854.

In reaching its conclusion in *Roland Electrical*, the Fourth Circuit relied on the "well settled construction that the (FLSA) takes as its standard a single workweek." *Id.* at 421 (*citing Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 579 (1942) ("It is likewise abundantly clear from the words of §7 that the unit of time under that section within which to distinguish regular from overtime is the week.")).

Except for cases examining whether it is proper to credit contractual premium payments earned under 29 U.S.C. 207(h) on a work period basis or in the aggregate against overtime due,[7] petitioners have found

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[7] As correctly noted by the panel, 207(h) credits are not applicable to this case. App. 21a. However, the panel was incorrect in stating that petitioners "appear to assume that the district court acted pursuant to 29 U.S.C. 207(h) of the FLSA," in making the offsets. App. 20a. To the contrary, petitioners argued that 207(h) was the only provision of 207 which permitted offsets and, since there were no 207(h) credits in this case, it was impermissible to allow offsets between work periods. *Herman v. Fabri-Centers of America*, 308 F.3d 580 (6th Cir. 2002), *cert. denied*, ___U.S.___, 123 S.Ct. 1353 (2003), contains the most recent and thorough review of the cases which have examined whether 207(h) premium credits are to be applied within the work period earned or can be applied against overtime due in other work periods. *Fabri-Centers* is a well reasoned opinion which restricted offsets to the work period in

no reported opinions which support the panel opinion in the instant case. In the absence of any statutory authority authorizing voluntary payments in excess of the amount required by the FLSA in certain work periods to offset statutorily deficient payments in other work periods, the conflict between *Roland Electrical* and the Fifth Circuit panel opinion in this case should be resolved in favor of the *Roland Electrical* reasoning that offsets are to be limited to the work period in which any such excess payments are paid because, as shown below, the FLSA and the cases interpreting it support the *Roland Electrical* holding.

b. While Section 207 does not itself specify the time period for calculating overtime, the provisions of the FLSA make clear that the workweek or work period is the applicable period. The substantive requirement of overtime is so framed: "No employer shall employ any of his employees who in any workweek is engaged in commerce *** for a workweek longer than forty hours *** unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. 207. Section 207 (e)(5)-(7) contemplates that contractual premiums will be paid on a workweek basis: "extra compensation provided by a premium rate paid for certain hours *** in any *** workweek." 29 U.S.C. 207(e)(5). *See* 29 U.S.C. 207(l) ("No employer shall employ any employee in domestic service for a workweek longer than forty hours); *Overnight Motor Transp. Co. v. Missel*, 316 U.S. at 579 ("It is likewise

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which the statutorily deficient payments were made. *Id.* at 592. There is no logical basis not to apply the same reasoning in this case.

abundantly clear from the words of §7 that the unit of time under that section within which to distinguish regular from overtime is the week."). And Department of Labor regulations highlight the primacy of the workweek or work period under the FLSA: "The general rule is that overtime compensation earned in a particular (work period) must be paid on the regular payday for the period in which such (work period) ends." 29 C.F.R. 778.106; *see* 29 C.F.R. 778.103 (directing employers to pay overtime due on a [work period] basis). 29 C.F.R. 778.104 is entitled, "Each workweek stands alone," and provides, "(t)he Act takes a single workweek as its standard and does not permit averaging over 2 or more weeks." 29 C.F.R. 778.104.

Because FLSA overtime is "payable pursuant to" the FLSA on a work period basis, offsets of amounts paid above the statutory minimums should logically be applied only on a work period basis. Further, to permit a voluntary payment in excess of the statutory minimum paid in one work period to offset the FLSA damages owed in another effectively reduces the employee's overtime award for the statutorily violative work period to an amount less than time and one-half, the very practice prohibited by 29 U.S.C. 207.

c. The Fifth Circuit panel opinion relative to applying offsets beyond the work period where overtime is due under the FLSA will result in serious abuses, introduces significant anomalies, and belies common sense. Under the FLSA, an employer cannot average the number of hours worked over several work periods (much less, at the time of trial, six-plus years) to avoid paying overtime. 29 C.F.R. 778.104 (giving example of 30 hours in one week and 50 hours in the

next).[8] Just as the examples of averaging would constitute an end run around the overtime requirement, the allowance of "excess payments," whenever paid, to offset some or all overtime liability accomplishes the same result. Under the panel opinion, the City was permitted to achieve this prohibited result by unlawfully withholding FLSA overtime payments earned by petitioners in two-out-of-every-three work periods over a period of six years, and then offsetting against the FLSA overtime liability the amounts which the City voluntarily paid in excess of the statutory minimums in one-out-of-every-three work periods during the same period of time. If the Fifth Circuit panel opinion is not reversed, any employer can rely on it, establish a statutorily violative pay plan similar to the City's and escape most – if not all – liability for such violations. Such a delay in payment violates 29 U.S.C. 207's mandate that employers promptly pay overtime compensation and the establishment of the work period as the fundamental unit for pay calculation purposes. *See* 29 C.F.R. 778.106; *Biggs v. Wilson*, 1 F.3d 1537, 1539, 1544 (9th Cir. 1993) (deeming unworkable any distinction between "late payment and nonpayment," and finding a delay of 14 days in the payment of wages owed under the statute to be a violation of the FLSA), *cert. denied*, 510 U.S. 1081 (1994).

The Fifth Circuit panel's opinion is impossible to reconcile with the FLSA's statute of limitations provision and the cases interpreting it. In FLSA cases involving overtime pay, a new cause of action accrues,

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[8] As a further example, if an employee works 20 hours in one week and 60 the next, the employer owes overtime in the second week even though the two weeks average 40 hours. *Howard v. City of Springfield*, 274 F.3d. 1141, 1149 (7th Cir. 2001).

for purposes of determining the proper limitations period (29 U.S.C. 255(a)), at each regular payday immediately following the work period during which services were rendered and for which overtime is claimed. *See Knight v. Columbus*, 19 F.3d 579, 582 (11th Cir. 1994), *cert. denied*, 513 U.S. 929; *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1050-51 (5th Cir.), *cert. denied*, 414 U.S. 822; *see also Bazemore v. Friday*, 478 U.S. 385, 395 (1986) ("Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII).

The allowance of excess payments in work periods where the FLSA was not violated to be applied as offsets – or to be construed as "prepayments" – to damages due for violating the FLSA is contrary to the foregoing authorities. The interpretation given by the panel suggests that an employee either could not file suit immediately following the failure to pay, because the employer might claim an offset from a previous work period where the employer paid more than the statutory overtime minimum, or the employee would be able to sue immediately, but his damages might disappear upon the employer's payment of an amount in excess of the statutory overtime minimum at a later date. Neither result makes sense. Instead, the violation occurs when the underpayment occurs, and offsets, if any, can only be claimed for "excess" compensation paid for work done in the same period in which the FLSA liability accrues.

The panel opinion rests on an implausible premise that Congress intended there to be *no* temporal limit on the ability of employers to carry "excess" pay forward or backward as a credit or offset against FLSA overtime. According to the panel opinion, employers

may effectively establish "running tabs" of FLSA liabilities and credits – offsetting "excess" payments and liabilities separated by years – subject to final settlement only when the employee leaves or sues.

The Administrator of the Wage and Hour Division of the United States Department of Labor, who enforces the FLSA under a statutory assignment of authority from Congress, 29 U.S.C. 204, has provided that, "(t)hough overtime compensation due an employee must normally be paid on the payday for the employee's regular work period or workweek, there is no objection if the employer pays in advance the anticipated overtime compensation to become due an employee for working overtime in some subsequent work period or workweek. This is the basic principle of the prepayment plan." Department of Labor, Wage-Hour Op. Letter, 1999 WL 33210916 (October 19, 1999). The administrator has issued rules regulating the basic requirements for "prepayment plans" in the *Wage and Hour Division Field Operations Handbook.* Field Operations Handbook, section 32j16c (June 30, 2000). Both the opinion letter and the handbook make clear that, for a valid prepayment plan, the employer and the employee "must agree that in any work period in which the employee works less than the applicable statutory overtime threshold, the employer will advance the employee the difference in pay for the overtime work period and the amount the employee would earn if paid only for the hours actually worked." *Id.*; Wage-Hour Op. Letter, 1999 WL 33210916. Plans of this type require the use of a record system under which the employer can maintain a running balance account for each employee of the amount owed by the employee to the employer's

credit.[9] *Id.* At no time may the employer owe the employee overtime compensation. *Id.* In any work period for which such prepayment credits due the employer are not sufficient to equal the additional overtime compensation due the employee, the difference must be paid to the employee in cash on the payday for such work period. *Id.*

Until the panel opinion was released on March 22, 2003, no one associated with this action ever claimed or suggested that the City had adopted a "prepayment plan," much less one which would be approved by the Administrator's rules. There was no evidence to any of the factors required for a valid prepayment plan. The panel opinion, after acknowledging there was no statutory basis of support for the City's payment plan, simply concluded that "it seems logical that an employer would choose to pre-pay its employees for the regularly scheduled work." App. 22a.

The far more sensible conclusion is that, had the City adopted a valid prepayment plan, the panel opinion would not have had to craft from thin air such a justification for offsetting statutorily violative work period shortfalls by "overpayments" in other work

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[9] The instant case demonstrates the value of such a record system. The panel characterized the offsets as "pre-payments" for the shortfalls which occurred in the 120-hour work periods. App. 22a. But, how did the panel know whether the pre-payment or the shortfall came first? There were three shifts of fire fighters working shifts of 120-120-96, 120-96-120, 96-120-120, respectively, every three weeks during the limitations period. It is impossible to know which came first – the pre-payment or the offset – for any one fire fighter under the record in this case, but it would have been possible to make that determination if a record system mandated by the Administrator existed.

periods; the City would have made such arguments and offered evidence to support the existence of a valid prepayment plan. Of course, that would have been impossible since the evidence conclusively established that petitioners never agreed to the pay plan over which they sued and that the City did not maintain a record system which maintained a running account of the balance owed by petitioners.

d. Without classifying the district court's offsets as a "prepayment plan," the panel opinion is devoid of any legal or factual basis for affirming the district court's allowance of offsets between work periods. The panel opinion is in conflict with *Roland Electrical* and the provisions of the FLSA and its regulations which establish the work period as the benchmark for calculating overtime. Because an employer's liability for its violations of the FLSA overtime provisions in certain work periods should not be offset by the employer's voluntary payments in excess of the statutory minimum in other work periods during the limitations period, certiorari should be granted on petitioners' first question presented.

2. The decision of the Fifth Circuit panel is a significant departure from the usual course of judicial and administrative interpretations of the FLSA relative to the calculation of damages for a salaried employee's regular rate, thus calling for the exercise of this Court's supervisory power. The panel effectively permitted a district court to unilaterally and retroactively impose a regulatory formula for determining the regular rate for employees who were owed FLSA overtime as a result of a statutory violative method of calculation and who had never agreed to accept the regulatory formula imposed.

a. The FLSA requires overtime to be computed at a rate not less than one and one-half times the regular rate at which an employee is employed. 29 U.S.C. 207. The phrase "the regular rate at which (an employee) is employed" is not self-defining. *Valerio v. Putnam Associates Incorporated*, 173 F.3d 35, 39 (1st. Cir. 1999). In the case of employees who are paid a salary, the overtime compensation regulations provide two methods by which to calculate an employee's "regular rate" of pay. 29 C.F.R. 778.113, .114. The first applies if the employee is paid a fixed weekly salary for a specific number of hours to be worked each week. 29 C.F.R. 778.113. The second applies if the employee is paid a fixed weekly salary regardless of how many hours the employee may work in a given week. 29 C.F.R. 778.114. The method described by 29 C.F.R. 778.114 is known as the "fluctuating workweek method" of calculating the regular rate, and requires a clear mutual understanding that the work period salary will cover all hours actually worked in the work period. 29 C.F.R. 778.114; *Samson v. Apollo Resources, Inc.*, 242 F.3d 629, 633 (5th Cir. 2001).

Where the fluctuating workweek method is applicable for a salaried employee, the overtime premium is calculated by dividing the fixed weekly salary by the number of hours that the employee *actually* works in a particular week to yield the employee's "regular rate of pay." *Samson v. Apollo Resources, Inc.*, 242 F.3d at 633. The employee is paid an overtime premium of one-half his regular rate of pay for each overtime hour. *Id.* This premium is in addition to his fixed weekly salary. *Id.* Under the fluctuating workweek method, the employee is effectively earning time and one-half as overtime. *Id.* However, his hourly wage and the actual amount of overtime pay he earns

decreases the more hours that he works. *Id.*

The Fifth Circuit panel correctly determined that the fluctuating workweek method was not applicable in this case. App. 27a. It also correctly identified 29 C.F.R. 778.113 as containing the proper formula for determining petitioners' regular rate. App. 17a. It further correctly stated that, pursuant to 778.113, the regular rate for petitioners was to be "computed by dividing the (work period) salary by the number of hours which it was intended to compensate." *Id.* Based on petitioners' six-week cycle of 14-day work period schedules of 120 hours, 120 hours, and 96 hours, the panel concluded that petitioners' work period salary was intended to compensate them for those scheduled hours "normally and regularly worked" during their work periods. App. 17a-18a. The panel made a critical mistake in its analysis, however, when it mistakenly assumed that petitioners' scheduled hours – those "normally and regularly worked" – were the same as the number of hours actually worked.[10] Id. Assuming *arguendo* that the panel was correct in holding that petitioners' work period salaries were intended to cover the number of hours scheduled in their work periods, the district court's order that the regular rate was to be computed by dividing the work period salary by the number of hours *actually* worked in the work period was not sustainable. The district court's order adopted the fluctuating workweek method and should not have been affirmed by the panel. By affirming the district court's formula for calculating damages and current pay for the

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[10] The fire fighters frequently worked shifts in addition to their scheduled hours. PX 31. Thus, each time a fire fighter worked an extra shift in a 120-hour work period, he actually worked 144 hours.

fire fighters, the panel permitted the "fluctuating method" to control the relevant calculations despite any mutual understanding between the parties that the work period salary would cover all hours actually worked.[11]

In both the "fluctuating method" and the district court-ordered formula, the work period salary is divided by the number of hours actually worked to determine the regular rate to be paid the employee.[12] The panel's error occurred because it focused on whether the district court multiplied the *overtime hours* by one and one-half or by one-half the regular rate. App. 27a. ("However, the fire fighters are incorrect to say that the district court applied the fluctuating method in this case. The district court did not calculate the fire fighters' damages by multiplying their overtime hours by one-half of their regular rate of pay. Instead, the district court multiplied the fire fighters' overtime hours (i.e. the hours exceeding 106 in a 14-day work period) by one and one-half of their regular rate of pay. The district court thus used the usual method of calculating overtime pay, not the less common fluctuating method."). The panel failed to recognize that, under the

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[11] The evidence was, in fact, to the contrary: in any work period where the fire fighters worked more than their scheduled hours – whether in a 96 or 120 hour work period – the city paid them time and one-half for all unscheduled hours, without recalculating their regular rates.

[12] *See* App. 16a ("The (district) court found that the regular rate must be determined by dividing the work period salary by the number of hours actually worked in a particular work period"); and *Samson v. Apollo Res., Inc.*, 242 F.3d at 633 ("The overtime premium is calculated by dividing the fixed weekly salary by the number of hours that the employee actually works in a particular week to yield the employee's 'regular rate of pay'").

fluctuating workweek method, "the employee is effectively earning time-and-one-half as overtime pay." *Samson v. Apollo Res., Inc.*, 242 F.3d at 633. Whenever a work period salary is divided by the same number (the hours "actually worked" in the work period) to achieve a regular rate ("RR"), it is axiomatic that the following equation, based on the no.-overtime hours in this case, is true and that the panel's observation that the district court multiplied petitioners' regular rate by one and one-half is inconclusive in determining whether the district court used the fluctuating workweek method to calculate petitioners' damages:

(106hrs.x RR)+(14 x 1.5RR)=(120hrs. x RR)+(14 x .5RR)
[Court-Ordered Formula] [Fluctuating Method]

The key, of course, to determining the correct regular rate – and a correct decision in this case – was to identify *the number by which the work period salary was to be divided*, not whether the overtime hours were multiplied by one-half or one and one-half. Each time the work period salary is divided by the total number of hours actually worked to achieve the regular rate, the same result is achieved under both the district court's order and the fluctuating method because they both divide the work period salary by the number of hours actually worked. The panel failed to recognize the significant difference between the formula it approved, dividing the work period salary by "the hours normally and regularly worked by an employee" (App. 17a), and the formula of the district court, which divided the work period salary by the total number of hours actually worked in the work period. App. 16a. Because the fire fighters frequently *actually worked* shifts in addition to their scheduled hours, the panel opinion formula and the district court formula are not the same: where a fire

fighter worked one extra shift in a work period in which he was scheduled to work 120 hours, the panel opinion would divide the work period salary by 120, the number of hours scheduled, while the district court divided the work period salary by 144, the number of hours actually worked. Allowing the district court to unilaterally impose the fluctuating workweek method as a remedy is unprecedented and must be reversed.

b. In the courts below, petitioners relied on prior Fifth Circuit precedent for the proposition that the regular rate was to be determined by dividing the work period salary by the maximum non-overtime hours permitted by the FLSA. *York v. City of Wichita Falls*, 48 F.3d 919, 921 (5th Cir. 1995) ("For salaried employees, the regular rate is determined by converting their annual pay rate to its non-overtime hourly equivalent by simply dividing one by the other. 29 C.F.R. §778.113."); *Wirtz v. Williams*, 369 F.2d 783, 785 (5th Cir. 1966) ("the formula for determining the regular rate of pay, which must be the hourly rate actually paid for non-overtime work, (citations omitted), is to divide the wages actually paid for non-overtime hours by the total non-overtime hours actually worked . . . ."); *Lee v. Coahoma County, Mississippi*, 937 F.2d 220 (5th Cir. 1991), *corrected by Lee v. Coahoma County, Mississippi*, 27 F.3d 1068, 1069 (5th Cir. 1993) ("In determining each deputy's[13] hourly wage in a given work period, the district court should multiply the deputy's monthly salary by twelve to get a yearly salary, ... The district court should then divide the yearly salary by the number of work periods in a year. The court should then divide the sum of the number of regular hours which may be worked in that

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[13] The employees in *Coahoma County* were subject to the 207(k) exemption, just as were petitioners.

work period according to 29 C.F.R. §553.233. This will result in a determination of each deputy's appropriate hourly wage in the work period determined by the district court). *Lee v. Coahoma County, Mississippi*, 27 F.3d at 1069. The panel did not address either *York* or *Wirtz*, and went out of its way to redefine the meaning of "regular hours" in *Coahoma County*. App.16a-17a.

Given the panel's refusal to follow (or even address) its own precedent, petitioners cannot point the Court to any other circuit's opinion which conflicts with the panel's holding that the regular rate is determined by dividing the work period salary by the number of hours it was intended to cover. However, petitioners argued at each level below that 29 U.S.C. 218(a) and Tex.Loc.Gov't Code 142.0015 also established the "the number of hours (petitioners') work period salary was intended to cover," just as did the foregoing – and ignored – Fifth Circuit precedent. State and local governments may enact laws that provide greater protection to employees than the FLSA. 29 U.S.C. 218(a). Employers must comply with the law that provides the greatest benefit to the employees. *Id.*; *Karr v. City of Beaumont*, 950 F.Supp. 1317, 1324 (E.D. Tex. 1997). Just as the employees in *Karr* were entitled to receive unpaid overtime pay under the more beneficial provisions of Tex.Loc.Gov't Code 142.0015, so, too, were petitioners even if this Court finds that the panel's formula or its affirmance of the district court's formula was correct under the FSLA and its regulations.

Texas Local Government Code section 142.0015 provides, in relevant part:

> (b) A fire fighter *** who is required or permitted to work more than the number

of hours that bears the same ratio to 212 hours as the number of days in the work period bears to 28 days is considered to have worked overtime. The person is entitled to be compensated for the overtime as provided by Subsection (e).

(c) A member of a fire department who does not fight fires ***, including a *** fire alarm dispatcher, ***, and who is required or permitted to average more hours in a week than the number of hours in a normal work week of the majority of the employees of the municipality other than fire fighters, emergency medical service personnel, and police officers, is considered to have worked overtime. The person is entitled to be compensated for the overtime as provided by Subsection (e).

(e) A fire fighter or other member of a fire department may be required or permitted to work overtime. A fire fighter or other member of the fire department *** who is required or permitted to work overtime as provided by Subsections (b) and (c) is entitled to be paid overtime for the excess hours worked without regard to the number of hours worked in any one week of the work cycle. Overtime hours are paid at a rate equal to 1½ times the compensation paid to fire fighter or member of the fire department for regular hours.

Tex.Loc.Gov't Code 142.0015.

The fire fighters are covered by section 142.0015(b) and (e), while the fire alarm operators are covered by (c) and (e). The Texas Legislature set the same formula for determining the rate for overtime hours for both fire fighters and fire alarm operators. Tex.Loc.Gov't Code 142.0013(e). Of significant importance to the review of this case, the state legislature did not use the FLSA term of art, "regular rate," but rather declared that the overtime rate to which petitioners were entitled was to be one and one-half times the employee's compensation for "regular hours." *Id* .

In *City of San Antonio v. Aguilar*, 696 SW2d 648, 655 (Tex.App. - San Antonio 1985, writ ref'd n.r.e. and dismissed), the only reported Texas case to ever expressly set forth the formula which is applicable for employees covered by 142.0015, the proper formula to be used was set forth:

> . . .we divide the weekly wage by forty to determine the hourly rate and multiply the number of hours in excess of forty by one and one-half (1½) to determine overtime.

On its face, *Aguilar* establishes the correct formula to be used for the fire alarm operators in this case. Though *Aguilar* was concerned with non-fire fighting personnel, it correctly enunciates the only formula found in 142.0015 which, with the words "work period" substituted for "week" and the appropriate number of non-overtime work period hours substituted for "40," is applicable to the fire fighters in this case:

> . . .we divide the (work period) wage by (106) to determine the hourly rate and multiply the number of hours in excess of (106) by one and one-half times (1½) to determine overtime.

City of San Antonio v. Aguilar, 696 SW2d at 655. Unlike the FLSA, which allows more than one method to calculate an employee's regular rate, 142.0015(e) provides only one method to calculate overtime pay. Thus, the *Aguilar* formula (which is the same formula as the *York*, *Wirtz*, and *Coahoma County* [pre-March 22, 2003] formulas) should have been utilized in this case. The district court's conclusion that the regular rate is determined by dividing the work period salary by the number of hours actually worked cannot be affirmed under Texas law, which is specifically recognized by 29 U.S.C. 218(a) as being effective.

c. Not only did the Fifth Circuit panel depart from the usual course of judicial proceedings by ignoring controlling authorities and allowing the district court to unilaterally impose the fluctuating workweek method on petitioners, it also erred by failing to recognize that, pursuant to 29 U.S.C. 218(a), the Texas statute provided the proper formula for determining the regular rate of the fire fighters in this case. Certiorari should be granted on the second question, too.

CONCLUSION

The petition for writ of certiorari should be granted as to both questions.

Respectfully submitted,

R. John Cullar
Counsel of Record
Mills, Cullar & McLeod, L.L.P.
801 Washington Avenue
Suite 217
Waco, Texas 76701
(254) 753-1991
Attorneys for Petitioners

(Any footnotes trail end of each document)
No. 01-51185, Case No. 01-51258

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSEPH SINGER, Individually and on Behalf of Others Similarly Situated; CHARLES LINDORFER, Individually and on Behalf of Others Similarly Situated; ROSALIO AMARO; CARL B AMMANN; JAMES A BAKER; ET AL, Plaintiffs - Counter Defendants - Appellants-Cross-Appellees,

Versus

CITY OF WACO, TEXAS; ET AL, Defendants,
CITY OF WACO, TEXAS,
Defendant - Counter Claimant - Appellee-Cross-Appellant;

JOSEPH SINGER, Individually and on Behalf of Others Similarly Situated; CHARLES LINDORFER, Individually and on Behalf of Others Similarly Situated; ROSALIO AMARO; CARL B AMMANN; JAMES A BAKER; ET AL, Plaintiffs - Counter Defendants - Appellees,

versus

CITY OF WACO, TEXAS; ET AL, Defendants,
CITY OF WACO, TEXAS,
Defendant - Counter Claimant – Appellant

March 27, 2003, Filed

COUNSEL: For JOSEPH SINGER, Individually and on Behalf of Others Similarly Situated, CHARLES LINDORFER, Individually and on Behalf of Others

Similarly Situated, ROSALIO AMARO, CARL B ANMANN, JAMES A BAKER, Plaintiffs-Counter Defendants - Appellants-Cross-Appellees: R John Cullar, Mills, Millar & Cullar, Waco, TX.

For CITY OF WACO, TEXAS, Defendant - Counter Claimant - Appellee-Cross-Appellant: Karen S Precella, Haynes & Boone, Fort Worth, TX. Bettye S Springer, Lu Pham, Karger, Key, Barnes & Springer, Fort Worth, TX. Arthur Lee Pertile, III, Waco, TX.

JUDGES: Before EMILIO M. GARZA and CLEMENT, Circuit Judges, and DAVIS *, District Judge.

OPINIONBY: EMILIO M. GARZA

OPINION: EMILIO M. GARZA, Circuit Judge:

Plaintiffs, former and current employees of the Waco Fire Department ("the fire fighters"), brought suit against the City of Waco ("the City"), claiming that the City's method of calculating their overtime pay violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq., as well as state law, see TEX. LOC. GOV'T CODE ANN. § 142.0015. The fire fighters prevailed at trial on most of the liability issues, but appeal the district court's calculation of damages. The fire fighters argue (1) that the district court erred in calculating their regular rate of pay; and (2) that the district court erred in offsetting certain overpayments made by the City against the overall damages award. The City admits that its pay practices violated the statute, but has filed a cross-appeal, challenging other issues. The City argues (1) that the FLSA is unconstitutional as applied in this case; (2) that it established a 28-day, and not a 14-day, work period, for its fire fighters; (3) that the district court erred in assessing liquidated damages against the City;

(4) that its violation of the FLSA was not willful; and (5) that the district court erred in calculating attorney's fees. Because we find no error in the district court's application of the FLSA and the relevant regulations, we affirm.

I

The fire fighters worked a regularly recurring schedule of 24 hours on-duty followed by 48 hours off-duty. According to this schedule, the fire fighters would work 120 hours in one 14-day period; 120 hours in the next 14-day period; and 96 hours in the third 14-day period, until the cycle repeated itself. The City paid the fire fighters every two weeks. Although the fire fighters worked different numbers of hours in each 14-day pay period, the City paid them the same two-week salary every pay period.

In order to calculate the fire fighters' overtime pay, the City had to determine the fire fighters' regular hourly rate of pay. To calculate the fire fighters' regular rate, the City divided the fire fighters' annual salary by 2,912, which (according to the City) represented the average number of hours that the fire fighters worked during a year. The City used the resulting figure (the fire fighters' hourly rate) to determine the fire fighters' overtime compensation. The fire fighters brought suit, claiming that the City's method of calculating their overtime compensation violated the FLSA. n1

On appeal, both the City and the fire fighters challenge various aspects of the district court's decision. We examine each issue in turn.

II

The City asserts that the FLSA is unconstitutional as applied in this case. The City contends that Congress does not have the affirmative power under the Commerce Clause to regulate the way in which a locality pays its fire fighters, because those employees perform solely local functions, and their actions do not substantially affect interstate commerce. The City relies in particular on Printz v. United States, 521 U.S. 898, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997), and United States v. Lopez, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), arguing that these cases illustrate the increasing limits on Congress's affirmative authority. The City's argument is interesting, but we believe that it is presently foreclosed by the Supreme Court's decision in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985), which upheld the constitutionality of the Fair Labor Standards Act as applied to state and local government entities. Id. at 555-57. The Supreme Court has made clear that "'if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" Agostini v. Felton, 521 U.S. 203, 237, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997) (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989)); see West v. Anne Arundel County, Md., 137 F.3d 752, 760 (4th Cir. 1998) (rejecting a constiftutional challenge to the FLSA and citing Agostini for the proposition that "lower federal courts have repeatedly been warned about the impropriety of preemptively overturning Supreme Court precedent"). Therefore, we proceed to the merits of this appeal.

III

The FLSA generally requires an employer to pay overtime compensation (at a rate of one and one-half times the regular rate of pay) to an employee after the employee has worked over 40 hours in one week. See 29 U.S.C. § 207(a)(1). The statute provides a partial exemption, however, for municipalities and other entities that employ fire fighters. See 29 U.S.C. § 207(k); 29 C.F.R. § 553.201(a). Under 29 U.S.C. § 207(k), a municipality can take advantage of that exemption by adopting a work period of between 7 and 28 days. If the municipality adopts a 7-day work period, it need not pay overtime compensation to its fire fighters until they have worked over 53 hours in a single week. See 29 C.F.R. § 553.201(a); id. § 553.230(a). If the municipality adopts a 14-day work period, it need not pay overtime compensation to its fire fighters until they have worked over 106 hours in the two-week period. See id. If the municipality adopts a 28-day work period, it need not pay overtime compensation to its fire fighters until they have worked over 212 hours in that four-week period. See id. Thus, by adopting a § 207(k) work period, a municipality can limit the number of hours for which it must pay "time-and-a-half" to its fire fighters.

The City argues that the question of whether it established a 28-day work period is a question of law that the district court improperly submitted to the jury. It is true that the ultimate determination of whether an employer qualifies for an exemption under the FLSA is a question of law. Lott v. Howard Wilson Chrysler-Plymouth, Inc., 203 F.3d 326, 331 (5th Cir. 2000). That ultimate determination, however, relies on many factual determinations that can be resolved by a jury. See Smith v. City of Jackson, Miss., 954 F.2d 296, 298 (5th Cir. 1992) ("Historical facts regarding the employment

history, and inferences based on these facts, are reviewed under the factual standard[.]").

In this case, the "ultimate" legal issue is whether the City qualifies for a § 207(k) exemption, and neither party contests that issue. The parties agree that the City qualifies for some type of exemption, and disagree solely over the extent of that exemption. The City contends that it established a 28-day work period, and did not have to pay overtime compensation until its fire fighters worked over 212 hours in that four-week period. The fire fighters, by contrast, argue that the City established a 14-day work period, and was required to pay overtime compensation after the employees worked over 106 hours in that two-week period. This issue (whether the City established a 14-day or a 28-day work period) is a question of fact, and was properly submitted to the jury. Spradling v. City of Tulsa, Okla., 95 F.3d 1492, 1504-05 (10th Cir. 1996) (observing that the establishment of a particular work period under § 207(k) is "normally a question of fact"); see also Lamon v. City of Shawnee, Kan., 972 F.2d 1145, 1147 (10th Cir. 1992) (noting that the issue of whether the employer established a 28-day work period was decided by the jury).

In this case, the jury determined that the City established a 14-day work period. The City claims that the jury's decision was erroneous because the jury relied on an improper instruction from the district court. The City refers to the following language in the jury instruction:The FLSA does not require the selection of a longer work period to be made in writing, or that certain 'magic words' be used. A city may show that it has established a longer work period through documents which state that it has established a longer work period. To be established by a city, the longer work period,

however, must have been put into effective operation by the city. A longer work period is put into effective operation when a city actually pays its fire fighting employees in accordance with the longer work period. A work period need not coincide with a pay period or duty cycle.

We review challenges to jury instructions for abuse of discretion and will reverse a judgment due to an improper instruction "only if the charge as a whole creates a substantial doubt as to whether the jury has been properly guided in its deliberations." Dahlen v. Gulf Crews, Inc., 281 F.3d 487, 494 (5th Cir. 2002) (internal quotation marks omitted).

The City claims that the district court's instruction misled the jury into thinking that a municipality can only establish a particular work period if it pays its employees in accordance with that work period. As the City observes, a municipality does not have to adopt a pay period that precisely matches its work period in order to qualify for a § 207(k) exemption. See 29 C.F.R. § 553.224 (observing that a work period established under § 207(k) "need not coincide with the duty cycle or pay period"); Franklin v. City of Kettering, Ohio, 246 F.3d 531, 535 (6th Cir. 2001) ("By stating that the work period 'need not coincide' with the duty cycle or pay periods, the regulation provides that there need be no relationship between the work period and the duty cycle."); Adair v. City of Kirkland, 185 F.3d 1055, 1061 (9th Cir. 1999) ("The City's failure to conform its payroll practices does not negate the existence of the plan.").

However, the district court's instruction did not misstate the law. The district court correctly told the jury that the City could establish a particular work period by demonstrating that it "actually pays its fire fighting

employees in accordance with the longer work period." See Freeman v. City of Mobile, Ala., 146 F.3d 1292, 1297 (11th Cir. 1998) (holding that the City established a 14-day work period in part by demonstrating that it paid its employees every 14 days). The district court did not tell the jury that the City was required to adopt a 28-day pay period in order to establish a 28-day work period. Indeed, the district court explicitly stated the opposite: "A work period need not coincide with a pay period or duty cycle." We find no error in the above jury instruction.

Finally, the City appears to argue that the evidence was insufficient to support the jury's verdict that it established a 14-day work period. First, we must consider whether the City waived this claim by failing to raise it in a motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50. See FED. R. CIV. P. 50(a),(b). That determination could affect the standard of review that we apply to the City's claim. See Polanco v. City of Austin, Tex., 78 F.3d 968, 973 (5th Cir. 1996). In most cases, "the standard for evaluating the sufficiency of evidence is whether the evidence has such quality that reasonable and fair-minded persons would reach the same conclusion." Id. at 974. However, if the City failed to present its sufficiency claim to the district court, the standard is plain error. See Giles v. General Elec. Co., 245 F.3d 474, 482 (5th Cir. 2001).

We have held that "[a] party that fails to move for judgment as a matter of law under Rule 50(a) on the basis of insufficient evidence . . . waives its right to file a . . . post-verdict Rule 50(b) motion, and also waives its right to challenge the sufficiency of the evidence on appeal." United States ex rel. Wallace v. Flintco Inc., 143 F.3d 955, 960 (5th Cir. 1998). We have occasionally made exceptions to this rule. For example, in cases where a

party failed to raise the sufficiency claim in a Rule 50(b) post-judgment motion, but presented it in a Rule 50(a) motion at the close of the plaintiff's case, we sometimes hold that the party did not waive the sufficiency claim. See Polanco, 78 F.3d at 974-75. In such instances, we apply our usual standard of review.

In the present case, however, it appears that the City failed to raise its sufficiency claim in either a Rule 50(a) or a Rule 50(b) motion. The City, at oral argument, nonetheless contended that it had not waived this claim because it presented the claim in its objection to the district court's jury instruction. It may be that a party can excuse its failure to make a Rule 50(a) motion by presenting the claim in an objection to the district court's jury instructions. See Wallace, 143 F.3d at 961-64 (observing, in a case where the party failed to make either a Rule 50(a) or a Rule 50(b) motion, that the party had also failed to present the issue in an objection to the jury instructions, and thus applying the plain error standard of review). In this case, we need not decide whether the City's objection to the jury instruction was adequately related to its sufficiency of the evidence claim. The City's claim fails under either the usual or the plain error standard of review. Cf. Daigle v. Liberty Life Ins. Co., 70 F.3d 394, 397 n.2 (5th Cir. 1996) ("The record is unclear as to whether or not [the plaintiff] made [the necessary] Rule 50 motions. However, in the present case the result is the same regardless[.]"). Thus, we proceed to address the merits of the City's sufficiency claim.

We have held that the employer bears the burden of proving that it qualifies for an exemption under the FLSA. Vela v. City of Houston, 276 F.3d 659, 666 (5th Cir. 2001); Smith, 954 F.2d at 298. Therefore, the City had to demonstrate that it was entitled to the exemption in §

207(k). See Adair, 185 F.3d at 1060; Roy v. County of Lexington, S.C., 141 F.3d 533, 540 (4th Cir. 1998); Jones v. City of Columbus, 120 F.3d 248, 252 (11th Cir. 1997); Spradling, 95 F.3d at 1504.

The City claims that it satisfied its burden of proving that it established a 28-day work period. The only evidence provided by the City in support of this contention is a memo circulated in 1985 by then Fire Chief Robert Mercer ("the Mercer memo"), stating that "[a] 28-day work cycle will be established[.]" The fire fighters rebutted this evidence with the deposition and testimony of Janice Andrews, the City's finance director. Andrews stated that the pay period for the City's fire fighters was 14 days, and that she understood the work period to be the same as the pay period. More significantly, Andrews stated that the City had always calculated overtime compensation on a 14-day basis. The jury could have concluded, based on this and other testimony, that the City established a 14-day work period.

Nevertheless, the City argues that the Mercer memo constitutes conclusive proof that it adopted a 28-day work period. In support of this argument, the City cites numerous cases in which courts have found that the locality met its burden of proving that it had taken advantage of the § 207(k) exemption. However, in each of these cases, the locality either presented more evidence than the City has offered in this case or the plaintiffs failed to present any contrary evidence. See, e.g., Franklin, 246 F.3d at 536 (observing that the City established a 28-day work period by demonstrating that it informed its employees about the work period in 1986 and again in 1995, and by producing evidence that the employees knew about the work period); Milner v. City of Hazelwood, 165 F.3d 1222, 1223 (8th Cir. 1999)

(holding that the City proved a 28-day work period not only by relying on a 1985 memo but also by demonstrating that the employees were scheduled on a "regularly recurring twenty-eight-day basis"); Adair, 185 F.3d at 1061 ("The City established a 7(k) exemption when it specified the work period in the [collective bargaining agreement] and when it actually followed this period in practice."); Freeman, 146 F.3d at 1297 (concluding that the City established a 14-day work period by relying on a 1974 resolution, a 1993 memorandum, and the fact that its payroll period was also 14 days); Lamon, 972 F.2d at 1154 (holding that the City could rely on a 1986 administrative code provision, when the evidence that it established a 28-day work period was "uncontested"). The City failed to produce any evidence other than the Mercer memo to prove that it established a 28-day work period, and, as we have seen, the fire fighters presented evidence that the work period was 14 days. Thus, we see no reason to disturb the jury's determination that the City established a 14-day work period.

IV

The jury also found that the City's violation of the FLSA was "willful." The issue of whether a particular violation was "willful" determines the statute of limitations that applies to that violation. See 29 U.S.C. § 255(a). If the violation was not willful, then a two-year statute of limitations applies. Id. If the violation was willful, however, a three-year statute of limitations applies. Id. As a result, employees can collect three years of unpaid wages and/or overtime compensation.

The City argues that the evidence was insufficient to support the jury's determination that it willfully violated the statute. The record indicates that the City waived its

sufficiency claim. Although the City raised this issue in a Rule 50(a) motion for judgment as a matter of law at the close of the fire fighters' case, the City apparently failed to raise the issue again in a Rule 50(a) motion at the close of the evidence (or in a Rule 50(b) post-judgment motion). As we discussed earlier, the City's failure to raise its sufficiency claim could affect our standard of review. The usual standard for sufficiency claims is "whether the evidence has such quality that reasonable and fair-minded persons would reach the same conclusion." Polanco, 78 F.3d at 974. When a party failed to raise the claim with the district court, the standard is plain error. Once again, however, we need not decide this issue, because the City's claim fails under either standard.

Under the FLSA, a violation is "willful" if the employer either "'knew or showed reckless disregard for . . . whether its conduct was prohibited by the statute.'" Reich v. Bay, Inc., 23 F.3d 110, 117 (5th Cir. 1994) (quoting McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133, 100 L. Ed. 2d 115, 108 S. Ct. 1677 (1988)). To demonstrate that the City's conduct satisfied this standard, the fire fighters presented testimony suggesting that the City knew its method of paying the fire fighters violated the FLSA. Mike Nichols, a lieutenant of fire suppression, testified that in 1995, he met with the assistant fire chief, who admitted he was aware that the fire fighters were being paid incorrectly. Larry Scott, the former director of human resources for the City, testified that the City cancelled a training seminar, which would have informed employees about overtime issues under the FLSA. Scott also stated that, several years ago, he attempted to convince the City to study its pay practices to determine if it was in compliance with the FLSA. He approached Janice Andrews, the city finance director, about this matter,

and she in turn talked to the city attorney. Evidently, the city attorney informed Andrews that "we don't even want to open that can of worms." This evidence amply supports the jury's finding that the City "either knew or showed reckless disregard for . . . whether its conduct was prohibited by the statute."

The City, however, contends that the jury's determination was based on incomplete information. The City argues that the district court erred by preventing two witnesses from testifying about the issue of willfulness. We review the district court's decision on this evidentiary question for abuse of discretion. Green v. Adm'rs of Tulane Educ. Fund, 284 F.3d 642, 660 (5th Cir. 2002).

The City wanted to present the testimony of City Manager Kathy Rice. The City stated that Rice would rebut Scott's testimony about the cancelled training seminar on the FLSA. The district court refused to allow Rice to testify because the City had never included Rice on its witness list, and could not provide a valid reason for this omission. As the fire fighters point out, Scott mentioned the cancelled seminar in his deposition, which took place approximately 30 days before trial. Thus, the City was aware of Scott's testimony, and had ample opportunity to include a rebuttal witness on its witness list. The district court did not abuse its discretion in refusing to allow the City to call this witness.

The City also wanted Raymond Cordelli, who formerly directed a division of the Department of Labor that dealt with FLSA issues, to testify about the issue of willfulness. The district court permitted Cordelli to testify, but limited his testimony to general explanations of how the FLSA applies to the payment of fire fighters--

i.e., the difference between the adoption of a 28-day and a 14-day work period. The City, however, also wanted Cordelli to testify as an expert on violations of the FLSA. According to the City, Cordelli would have stated that, based on his experience, the City likely did not know that its pay practices violated the FLSA. As the district court observed, it is unclear how Cordelli could have been aware of whether the City "knew or showed reckless disregard for . . . whether its conduct was prohibited by the statute." Cordelli was not an employee of the City, and does not appear to have been a party to any of the events leading up to this litigation. The district court did not abuse its discretion in preventing Cordelli from testifying about the willfulness issue.

V

The City contends that the district court erred in assessing liquidated damages. Under the FLSA, an employer who violates the overtime provisions is liable not only for the unpaid overtime compensation, but also for "an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). At one time, this liquidated damages assessment was mandatory. See Bernard v. IBP, Inc. of Neb., 154 F.3d 259, 267 (5th Cir. 1998). However, the district court can now decline to award such damages (or reduce the amount) if the court concludes that the employer acted in "good faith" and had "reasonable grounds" to believe that its actions complied with the FLSA. 29 U.S.C. § 260. We review the district court's decision to award liquidated damages for abuse of discretion. See Heidtman v. County of El Paso, 171 F.3d 1038, 1042 (5th Cir. 1999); Lee v. Coahoma County, Miss., 937 F.2d 220, 226 (5th Cir. 1991).

We have held that an employer "faces a 'substantial burden' of demonstrating good faith and a reasonable

belief that its actions did not violate the FLSA." Bernard, 154 F.3d at 267 (quoting Mireles v. Frio Foods, Inc., 899 F.2d 1407, 1415 (5th Cir. 1990)). In this case, the jury found the City's actions to be willful. As a result, the City could not show that it acted in good faith. Thus, the district court did not abuse its discretion in assessing liquidated damages. Cf. Heidtman, 171 F.3d at 1042 ("Because employers cannot act in good faith based on reasonable grounds when they suspect that they are out of compliance with the FLSA, it would have been an abuse of discretion if the district court had not awarded liquidated damages.") (emphasis in original). n2

VI

The fire fighters argue that the district court erred in calculating their regular hourly rate of pay and, as a result, improperly calculated damages. We review de novo the district court's determination of the regular rate of pay under the FLSA. See Lee, 937 F.2d at 224.

In order to determine an employee's overtime compensation, we must calculate the employee's regular hourly rate of pay. In determining the regular rate, we are guided by the regulations provided by the Department of Labor ("DOL"). See Vela, 276 F.3d at 667 ("This court must defer to these DOL regulations if . . . they are 'based on a permissible construction of the statute.'") (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)). In order to calculate the hourly rate of pay for salaried employees, we must determine their work period salary. See 29 C.F.R. § 778.113(b) ("Where the salary covers a period longer than a work week, . . . it must be reduced to its workweek equivalent."). n3 In this case, the jury found that the fire fighters worked 14-day work periods. The district court thus took the fire

fighters' yearly salary and divided it by 26 (the number of 14-day work periods in a single year) to determine the fire fighters' work period salary.

The district court then proceeded to calculate the fire fighters' regular hourly rate of pay. The court found that the regular rate must be determined by dividing the work period salary by the number of hours actually worked in a particular work period. The court observed that, because of the fire fighters' alternating schedule (24 hours on-duty, 48 hours off-duty), they did not work the same number of hours in every two-week work period. In a six-week period, the fire fighters would work 120 hours in one 14-day work period; 120 hours in another 14-day work period; and 96 hours in the remaining 14-day work period. The district court calculated the regular rate of pay for the 120-hour work periods by dividing by 120. The court determined the regular rate for the 96-hour work periods by dividing by 96.

The fire fighters argue that the district court used the wrong divisor. They contend that the district court erred by including overtime hours in the divisor. They claim that, for all work periods, the court should have divided by 106: the maximum number of non-overtime hours that fire fighters can work in a 14-day work period. See 29 C.F.R. § 553.201(a); id. § 553.230(a).

The fire fighters rely on our decision in Lee v. Coahoma County, Mississippi, 937 F.2d 220 (5th Cir. 1991), corrected by Lee v. Coahoma County, Mississippi, 37 F.3d 1068, 1069 (5th Cir. 1993). In Lee, we explained that, in determining the regular rate of pay, the district court should divide the work period salary "by the number of regular hours which may be worked in that work period[.]" 37 F.3d at 1069. The fire fighters interpret the term "regular hours" to mean non-overtime

hours.

However, the fire fighters misinterpret our holding in Lee. We did not state that "regular hours" can only include non-overtime hours. On the contrary, we believe that the term "regular hours" is more appropriately defined as the hours normally and regularly worked by an employee. Cf. 29 C.F.R. § 553.224 (defining "work period" as "any established and regularly recurring period of work"). In the case of the fire fighters, who work 120 hours in two out of every three 14-day work periods, they normally and regularly work overtime. Thus, the district court did not err in calculating the fire fighters' regular rate by dividing their work period salary by both non-overtime and overtime hours. See 29 C.F.R. § 778.325 (observing that some employees' regular schedules include overtime hours); Aaron v. City of Wichita, Kan., 54 F.3d 652, 656 (10th Cir. 1995).

Indeed, the district court was required to include all the hours regularly worked by the fire fighters in the divisor. Under the FLSA, the regular hourly rate for salaried employees "is computed by dividing the salary by the number of hours which the salary is intended to compensate." 29 C.F.R. § 778.113(a) (emphasis added); see Adams v. Dept. of Juvenile Justice of City of New York, 143 F.3d 61, 66 (2d Cir. 1998); Monahan v. County of Chesterfield, Va., 95 F.3d 1263, 1283 (4th Cir. 1996); Aaron, 54 F.3d at 655. We can determine how many hours the salary "is intended to compensate" by examining what happens under the contract. See 29 C.F.R. § 778.108 ("The 'regular rate' of pay . . . cannot be left to a declaration by the parties . . .; it must be drawn from what happens under the employment contract."); Adams, 143 F.3d at 67. In this case, the fire fighters have for a number of years worked according to the 120-120-96-hour schedule, and they have consistently accepted

two-week paychecks as compensation for this work. Although, as the City now admits, these paychecks did not adequately compensate the fire fighters for their overtime in every work period, these paychecks were nonetheless intended to compensate the fire fighters for all of their regularly scheduled (non-overtime and overtime) hours. Cf. Monahan, 95 F.3d at 1279 n.20 ("It is difficult to believe that the [employees] would blindly accept these positions unaware of the hours they would be expected to work or can now claim they were unaware of those hours in spite of their continued and repeated acceptance of paychecks under the same scheduling cycle."). Thus, the district court, when calculating the fire fighters' hourly rate, correctly included both non-overtime and overtime hours in the divisor. Therefore, we find no error in the district court's method of calculating the fire fighters' overtime pay. n4

The fire fighters also claim that the district court erred in its calculation of damages by crediting the account summaries prepared by the City's accountant over those of the fire fighters' accountant. In the absence of an error of law, we review the district court's award of damages for clear error. In re Liljeberg Enters., Inc., 304 F.3d 410, 447 (5th Cir. 2002). In this case, the fire fighters' accountant prepared her account summaries by relying on data compiled by the fire fighters' counsel and his assistants. The fire fighters' accountant failed to audit the fire fighters' payroll records herself, and thus failed to verify the data upon which her conclusions were based. The City's accountant, by contrast, did conduct her own audit. As a result, the district court found the account summaries prepared by the City's accountant to be more reliable. We find no error (much less clear error) in the district court's determination.

VII

The fire fighters contend that the district court erred in offsetting the overpayments made by the City in some work periods against the overall damages owed by the City. The fire fighters contend that the district court did not have the authority under state or federal law to apply the offset. We review this issue of law de novo.

In determining the plaintiffs' overtime pay, the district court found that the City's method of calculating overtime compensation resulted in small deficiencies (for example, $ 6.60) n5 in the work periods in which the fire fighters worked 120 hours. However, the City's method resulted in considerable overpayments ($ 126.20) in the work periods in which the fire fighters worked 96 hours. The district court stated that "permitting the Plaintiffs to receive a windfall by not taking into account the City's overpayment would result in unjust enrichment." The court thus offset the overpayments made by the City in the 96-hour work periods against the shortfalls in the 120-hour work periods. n6

The fire fighters insist that the district court did not have the authority to apply this offset. To the extent that the district court relied on the state law doctrine of "unjust enrichment," we agree with the fire fighters. Under Texas law, unjust enrichment is a narrow remedy. The state courts have made clear that "unjust enrichment is not a proper remedy merely because it might appear expedient or generally fair that some recompense be afforded for an unfortunate loss . . . or because the benefits to the person sought to be charged amount to a windfall." HECI Exploration Co. v. Neel, 982 S.W.2d 881, 891, 42 Tex. Sup. Ct. J. 361 (Tex. 1998) (emphasis added) (internal quotation marks omitted);

Heldenfels Bros., Inc. v. City of Corpus Christi, 832 S.W.2d 39, 42, 35 Tex. Sup. Ct. J. 802 (Tex. 1992) (same); see Acad. Corp. v. Interior Buildout & Turnkey Constr., Inc., 21 S.W.3d 732, 741 (Tex. App. 2000) (same). n7

The fire fighters also contend that the district court lacked the authority under the FLSA to apply the offset. The fire fighters appear to assume that the district court acted pursuant to § 207(h) of the FLSA. That provision states that employers may offset certain overtime premiums against overtime compensation due under the statute. See 29 U.S.C. § 207(h)(2). The fire fighters, relying on several cases interpreting § 207(h), argue that the provision does not permit a district court to offset overpayments made in some work periods against shortfalls in other work periods. See Herman v. Fabri-Ctrs. of Am., Inc., 308 F.3d 580, 590 (6th Cir. 2002) ("Premium credits allowed by § 207(h)(2) should be limited to the same workweek or work period in which these premiums were paid."); Howard v. City of Springfield, Ill., 274 F.3d 1141, 1149 (7th Cir. 2001) (holding that "the district court erred in allowing the blanket application of all [§ 207] premium payments to all overtime liabilities"); Nolan v. City of Chicago, 125 F. Supp. 2d 324, 331 (N.D.Ill. 2000) (finding that "offsets [under § 207(e)(5) and (6)] should be calculated on a period by period basis"); but see Kohlheim v. Glynn County, Ga., 915 F.2d 1473, 1481 (11th Cir. 1990) (stating that an employer should be permitted to offset "all previously paid overtime premiums . . . against overtime compensation found to be due") (emphasis in original).

As the fire fighters themselves point out, however, § 207(h) does not apply in this case. See Brief of Appellants Singer et al. at 39. Section 207(h) refers to the overtime premiums listed in § 207(e) of the FLSA. That provision refers to payments that are not included

in determining the regular rate of pay. See 29 U.S.C. § 207(e). n8 These overtime premiums are extra payments made by employers. These sums are excluded from the total salary (from which the regular hourly rate is calculated) so that they do not improperly inflate the hourly rate. See Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 464, 92 L. Ed. 1502, 68 S. Ct. 1186 (1948) ("If [an] overtime premium is included in the weekly pay check that must be deducted before the division. . . . To permit [the] overtime premium to enter into the computation of the regular rate would be to allow overtime premium on overtime premium -- -- a pyramiding that Congress could not have intended."). In this case, the district court included the overpayments made to the firefighters in determining the fire fighters' regular rate of pay. The court did not treat the overpayments as "overtime premiums." Therefore, § 207(h), and the cases interpreting it, are inapplicable.

The fire fighters nonetheless contend that the district court cannot offset overpayments in some work periods against shortfalls in other work periods. The fire fighters rely on a provision of the regulations stating that "the general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends." 29 C.F.R. § 778.106. The provision makes clear that the payment of overtime compensation may be delayed only for a period that is "reasonably necessary for the employer to compute and arrange for payment[.]" Id. The fire fighters insist that the district court's order violates this provision by permitting the City to pay its overtime obligations "at a time far removed from when the overtime was due[.]" Brief of Appellants Singer et al. at 42.

The fire fighters mischaracterize the nature of the offset. The district court did not permit the City to pay its overtime obligations years after they were due. Instead, the court simply acknowledged that the City already paid the bulk of its overtime obligations. When the City overpaid its employees in the 96-hour periods, it essentially compensated the employees for the shortfalls in the 120-hour periods.

Of course, as the fire fighters point out, if those overpayments are seen as "late" payments of overtime compensation, they would nonetheless violate the FLSA. As § 778.106 makes clear, an employer violates the FLSA not only by failing to pay overtime compensation but also by delaying the payment of overtime compensation. See Halferty v. Pulse Drug Co., Inc., 821 F.2d 261, 271 (5th Cir. 1987) ("A cause of action accrues at each regular payday immediately following the work period during which the services were rendered for which the wage or overtime compensation is claimed.").

However, we need not view the overpayments made by the City during the 96-hour work periods as "late" payments of overtime compensation. It seems more appropriate to view those overpayments as pre-payments: the City pre-paid the fire fighters to compensate them for the shortfalls they would receive in subsequent 120-hour work periods. Although § 778.106 states that overtime compensation "generally" should be paid in the same work period in which the work is performed, the provision does not prohibit an employer from paying overtime compensation in advance. Indeed, in cases such as the present one, in which the employees regularly work overtime, it seems logical that an employer would choose to pre-pay its employees for that regularly scheduled work. Thus, we hold that the district court did not err in offsetting the

overpayments paid to the fire fighters in some work periods against the shortfalls in other work periods. n9

VIII

The City argues that the district court erred in calculating attorney's fees. n10 We review the district court's award of attorney's fees for abuse of discretion and its factual findings for clear error. Mathis v. Exxon Corp., 302 F.3d 448, 461-62 (5th Cir. 2002).

The district court correctly applied the lodestar method in calculating attorney's fees. See Heidtman, 171 F.3d at 1043 (confirming that the lodestar method applies in cases arising under the FLSA). The lodestar is "calculated by multiplying the number of hours reasonably expended by an appropriate hourly rate in the community for such work." Id. After the district court determined this figure, the court examined whether, based on the factors mentioned in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), it should increase or decrease the lodestar. n11 The district court found that three factors (the novelty and difficulty of the questions presented; the skill required to perform the legal services properly; and the experience, reputation, and ability of the fire fighters' attorney) "weighed in favor of a moderate upward adjustment." The court also observed, however, that another factor (the amount involved and the result obtained) "weighed in favor of a downward adjustment." n12 As a result, the court did not alter the lodestar amount.

The City argues that the district court should have assessed attorney's fees on an individual basis. The City contends that, if the district court had followed this method, the award would have been lower. The City

observes that, after the district court applied the offset, a number of individual plaintiffs were not awarded any damages. The City reasons that, because "attorney's fees awarded under the FLSA are typically assessed based upon the amount of the monetary recovery a plaintiff receives in the matter," the district court would have awarded a lower amount if it had awarded fees on a plaintiff-by-plaintiff basis. Brief of Appellee/Cross Appellant City of Waco at 55.

The City essentially contends that the district court should have reduced the lodestar because the fire fighters received a much lower damage award than they sought. As the City apparently recognizes, we have stated that "the most critical factor in determining a fee award is the 'degree of success obtained.'" Romaguera v. Gegenheimer, 162 F.3d 893, 896 (5th Cir. 1998) (quoting Hensley v. Eckerhart, 461 U.S. 424, 436, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983)). In this case, because the fire fighters sought $ 5 million in damages, and collected only $ 180,000, their monetary success was limited. However, this fact did not require the district court to reduce the lodestar. We have made clear that "while a low damages award is one factor which a district court may consider in setting the amount of attorney's fees, this factor alone should not lead the district court to reduce a fee award." Hollowell v. Orleans Reg'l Hosp. LLC, 217 F.3d 379, 392 (5th Cir. 2000); see Spegon v. Catholic Bishop of Chicago, 175 F.3d 544, 558 (7th Cir. 1999) (observing, in a lawsuit initiated under the FLSA, that "an attorney's failure to obtain every dollar sought on behalf of his client does not automatically mean that the modified lodestar amount should be reduced").

In this case, the district court considered lowering the attorney's fees due to the fire fighters low recovery, but declined to do so. Cf. Louisiana Power & Light Co. v.

Kellstrom, 50 F.3d 319, 329 (5th Cir. 1995) (observing that the district court's lodestar analysis is inspected primarily to ensure that "the court sufficiently considered the appropriate criteria") (emphasis in original). The district court found that, because other factors weighed in favor of an upward departure, it would have been inappropriate to reduce the lodestar in this case. The district court did not abuse its discretion in declining to adjust the lodestar. Cf. Heidtman, 171 F.3d at 1044 (noting the "strong presumption that the lodestar award is the reasonable fee").

For the above reasons, the judgment of the district court is AFFIRMED.

FOOTNOTES

* District Judge of the Eastern District of Texas, sitting by designation.

n1 A number of fire alarm operators were among the 180 plaintiffs who originally filed suit. The claims of these plaintiffs do not appear to be the subject of this appeal.

n2 The City also contends that the district court assessed liquidated damages at the improper time. The City argues that the district court should have assessed liquidated damages after offsetting certain overpayments made by the City against any unpaid overtime compensation. (The issue of "offset" is discussed further in this opinion. See infra.) If the court had first applied the offset, the fire fighters' damages (before the assessment of liquidated damages) would have been lower. Thus, the corresponding "additional equal amount" of liquidated damages would also have been lower. See 29 U.S.C. § 216(b). The district court instead assessed liquidated damages before applying the

offset, and thus awarded a higher amount of liquidated damages. The City does not cite any case law to support its argument that the district court assessed liquidated damages prematurely. Nor does the statutory language referred to by the City require the district court to apply an offset before awarding liquidated damages. We therefore reject the City's claim.

n3 29 C.F.R. Part 778 describes the method of calculating the regular rate of pay for individuals who are employed on a "work week" basis. Fire suppression personnel who are employed under § 207(k) are, of course, employed on a "work period" basis. The regulations provide that employers (and courts) should calculate the regular rate for § 207(k) employees by using the formulas in 29 C.F.R. Part 778, and simply substituting the applicable "work period" for "workweek." 29 C.F.R. § 553.233.

n4 The fire fighters contend that the district court erred by using the "fluctuating method" to calculate their overtime compensation. See 29 C.F.R. § 778.114 (explaining the fluctuating method); Samson v. Apollo Res., Inc., 242 F.3d 629, 633 (5th Cir. 2001) (same). Under the fluctuating method, an employee's work period salary compensates him for all of his non-overtime hours, and part of his overtime hours. As a result, the employee's overtime hours are multiplied only by one-half (instead of one and one-half) the regular rate of pay. Id. In other words, the employee, instead of receiving "time and a half" for his overtime hours, receives only "a half." See Heder v. City of Two Rivers, Wis., 295 F.3d 777, 779 (7th Cir. 2002) (observing that, if fire fighters work a fluctuating workweek, "their standard compensation covers any number of hours, so that the only statutorily required payment is the 50% premium for overtime") (emphasis in original).

The fire fighters correctly observe that the fluctuating method would be inappropriate in this case. An employer can use this method only if the employer and employee have a "clear mutual understanding" that the method applies. 29 C.F.R. 778.114(a); Heder, 295 F.3d at 780; Valerio v. Putnam Assoc. Inc., 173 F.3d 35, 39 (1st Cir. 1999). In this case, neither party has presented evidence of such a "clear mutual understanding."

However, the fire fighters are incorrect to say that the district court applied the fluctuating method in this case. The district court did not calculate the fire fighters' damages by multiplying their overtime hours by one-half of their regular rate of pay. Instead, the district court multiplied the fire fighters' overtime hours (i.e., the hours exceeding 106 in a 14-day work period) by one-and-one half of their regular rate of pay. The district court thus used the usual method of calculating overtime pay, not the less common fluctuating method. See 29 C.F.R. § 778.107 ("The general overtime pay standard . . . requires that overtime must be compensated at a rate not less than one and one-half times the regular rate at which the employee is actually employed[.]").

n5 We refer to the example provided by the district court: the overtime compensation owed to Joe Singer in one six-week period.

n6 We note that the City owed the fire fighters four years of unpaid overtime compensation. Although the applicable limitations period under the FLSA was three years, the limitations period under state law was four years. See TEX. LOC. GOV'T CODE ANN. § 142.0015; TEX. CIV. PRAC. & REM. CODE ANN. § 16.051; see also 29 U.S.C. § 218(a) (permitting states to adopt labor standards that are more stringent than the FLSA). The

district court offset the City's overpayments against all four years of unpaid overtime compensation.

n7 Even if the district court could apply the doctrine of unjust enrichment in this case, the court used the wrong statute of limitations. The Texas Supreme Court has stated that the statute of limitations for unjust enrichment claims is two years. HECI Exploration Co., 982 S.W.2d at 885. Thus, the district court could have applied the offset only to two years of violations.

Although we conclude that the district court could not rely on the state law doctrine of unjust enrichment, we do not hold that the district court lacked the authority to apply an offset to the four years of state law violations. We note that the applicable provision of the Texas code adopts the same overtime standards for fire fighters as the FLSA. See TEX. LOC. GOV'T CODE ANN. § 142.0015; see also City of San Antonio v. Aguilar, 696 S.W.2d 648, 655 (Tex. App. 1985) (holding, when construing an earlier version of § 142.0015, that state law "should emulate the method of overtime calculation done under the Fair Labor Standards Act"). It follows that, if the FLSA permits an offset, then so does Texas state law. Cf. Brookshire Bros., Inc. v. Lewis, 997 S.W.2d 908, 920 (Tex. App. 1999) (noting that "an offset against damages applies to prevent a plaintiff from obtaining more than one recovery for the same injury") (internal quotation marks omitted). As discussed in the text, we hold that the FLSA does not prohibit the district court from applying an offset. We therefore also conclude that the district court could apply the offset to all of the City's overtime obligations–whether owed under state or federal law.

n8 Section 207(e) states that the "'regular rate' . . . shall be deemed to include all remuneration for employment

paid to, or on behalf of, the employee, but shall not be deemed to include" the following overtime premiums:(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section, where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek[.])29 U.S.C. § 207(e)(5),(6),(7) (emphasis added) (footnote omitted).
n9 Our decision in Brennan v. Heard, 491 F.2d 1 (5th Cir. 1974), rev'd on other grounds by McLaughlin, 486 U.S. at 130, 134 n.10, is not to the contrary. In that case, we stated that "set-offs against back pay awards deprive the employee of the 'cash in hand' contemplated by the Act,

and are therefore inappropriate in any proceeding brought to enforce the FLSA minimum wage and overtime provisions[.]" Id. at 4. It is important, however, to recognize the context of our statement. In that case, the offsets permitted by the district court caused "the final awards to many of [the] defendants' workers [to drop] below the statutory minimum[.]" Id. at 3. In this case, no party contends that the offset might cause the fire fighters' wages to fall below the statutory minimum wage. Thus, Brennan does not prohibit the district court from applying an offset in this case. See Mullins v. Howard County, Md., 730 F. Supp. 667, 673 (D. Md. 1990) (recognizing that "the [Brennan v.] Heard case stands for the principle that set-offs may not result in sub-minimum wage payments to an employee").

n10 The FLSA requires an employer who violates the statute to pay attorney's fees. See 29 U.S.C. § 216(b).

n11 The Johnson factors are: (1) the time and labor required to represent the client or clients; (2) the novelty and difficulty of the issues in the case; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney; (5) the customary fee charged for those services in the relevant community; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or circumstances; (8) the amount involved and results obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Heidtman, 171 F.3d at 1043 n.5 (citing Johnson, 488 F.2d at 717-19).

n12 The fire fighters sought over $ 5 million in damages,

but, largely because of the offset applied by the district court, recovered approximately $ 180,000 in damages.

No. 01-51185, Case No. 01-51258

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSEPH SINGER, Individually and on Behalf of Others Similarly Situated; CHARLES LINDORFER, Individually and on Behalf of Others Similarly Situated; ROSALIO AMARO; CARL B AMMANN; JAMES A BAKER; ET AL, Plaintiffs - Counter Defendants - Appellants-Cross-Appellees,

Versus

CITY OF WACO, TEXAS; ET AL, Defendants, CITY OF WACO, TEXAS, Defendant - Counter Claimant - Appellee-Cross-Appellant;

JOSEPH SINGER, Individually and on Behalf of Others Similarly Situated; CHARLES LINDORFER, Individually and on Behalf of Others Similarly Situated; ROSALIO AMARO; CARL B AMMANN; JAMES A BAKER; ET AL, Plaintiffs - Counter Defendants - Appellees,

versus

CITY OF WACO, TEXAS, Defendant - Counter Claimant – Appellant

April 22, 2003, Filed

PRIOR HISTORY:
Appeals from the United States District Court for the Western District of Texas, Waco. Singer v. City of Waco,

324 F.3d 813, 2003 U.S. App. LEXIS 5858 (5th Cir. Tex., 2003)

JUDGES: Before EMILIO M. GARZA and CLEMENT, Circuit Judges, and DAVIS, * District Judge.

OPINIONBY: Emilio M. Garza

OPINION: ON PETITION FOR REHEARING EN BANC PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Emilio M. Garza
United States Circuit Judge

FOOTNOTES

* District Judge of the Eastern District of Texas, sitting by designation.

Case Number: W-99-CA-296

UNITED STATES DISTRICT COURT DISTRICT OF WESTERN TEXAS

JOSEPH SINGER, ET AL
Plaintiffs

v.

CITY OF WACO, TEXAS
Defendant

JUDGMENT IN A CIVIL CASE

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IS ORDERED AND JUDGED
that the Judgment be entered in favor of Plaintiffs It is further

ORDERED that Defendant City of Waco, Texas pay each Plaintiff money damages as more fully described in Amended Exhibits A and B.

September 14, 2001

William G. Putnicki
Clerk

CIVIL ACTION NO. W-99-CA-296

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
WACO DIVISION

JOSEPH SINGER and CHARLES LINDORFER,
Individually and on Behalf of Others Similarly Situated,
Plaintiffs,

v.

CITY OF WACO, TEXAS,
Defendant.

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING DAMAGES[1]

The Court considers this case following a trial before the Court on the issue of damages which was held on July 12, 2001. The Court had earlier granted the parties' request that the issue of damages he bifurcated from the liability issues. Therefore, a trial before a jury was held regarding liability under the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. ("FLSA") and Texas Local Government Code section 142.0015 on April 9-12, 2001. The jury found that the City established a 14-day work period under section 207(k) of the FLSA for its Fire Suppression Employees. The jury also found that the City acted willfully when it failed to properly pay the Plaintiffs overtime due under the FLSA, and further found that the City lacked a good faith and reasonable belief that its conduct did not violate the FLSA.

Findings of Fact

1. This lawsuit was filed on September 28, 1999.

2. Plaintiffs in the case are 180 former or current employees of the Waco Fire Department Defendant City of Waco is a Texas municipality.

3. There are two separate categories of Plaintiffs involved in this case—fire suppression employees and fire alarm operator employees.

4. Following the jury trial on the liability issues, Ms. Dora Dyson was hired by the Plaintiffs to conduct an accounting review of the payroll records produced by the City for each of the Plaintiffs.

5. Dyson is a Certified Public Accountant with extensive experience, training and knowledge of accounting procedures and audits.

6. Dyson's work for the Plaintiffs involved analyzing accounting summary sheets prepared for each Plaintiff for each pay period between October 1, 1995 and August 24, 2000.

7. Plaintiffs' counsel prepared the accounting summary sheets for Dyson.

8. Plaintiffs' counsel testified that he and his staff prepared the accounting summary sheets for each Plaintiff for each pay period from each Plaintiffs employment and payroll records provided to Plaintiffs' counsel during discovery.

9. The data on the accounting summary sheets provided to Dyson were derived from three primary sources—each Plaintiff's "service record," "check history listing detail," and "P-sheet."

10. A "service record" is that record kept by the City which indicates each Plaintiff's monthly salary and any add-on pay (e.g., educational incentive pay, certification pay, and longevity pay), as well as each hire date and time-in-grade.

11. A "check history listing detail" is basically the check stub given to each Plaintiff that indicates the gross and net pay for each pay period, and indicates the employee's add-on pay for a particular pay period.

12. A "P-sheet" is an attendance sheet upon which each Plaintiff marks "P" to indicate that the Plaintiff was present during a particular shift, "S" to indicate the use of sick leave during that shift, or "V" to indicate the use of vacation time.

13. Dyson conducted what is termed by accountants and auditors as an "agreed upon procedure." In this procedure, the accountant takes raw data provided by the client and follows a set of rules or instructions, also provided by the client, to reach an outcome.

14. In this case, Dyson was to determine the payroll amounts the City should have paid each Plaintiff in each 14-day pay period from October 1, 1995 until August 24, 2000 ("correct gross pay"). Dyson was then to determine the dollar amount of underpayments owed by the City to each Plaintiff in each 14-day pay period by subtracting the actual gross pay for each Plaintiff in each 14-day pay period from the correct gross pay. Dyson was then to prepare a report that indicated the amount of money damages the City owed each Plaintiff in each pay period.

15. Plaintiffs requested that Dyson prepare a report for each year of the liability period. Dyson examined the pay periods from October 1995 to September 1996

("Year 1"), October 1996 to September, 1997 ("Year 2"), October 1997 to September 1998 ("Year 3"), October 1998 to September 1999 ("Year 4"), and October 1999 to September 2000 ("Year 5").

16. Dyson stated that she followed these instructions provided to her by the Plaintiffs:[2]

a. First, determine the work period salary. Dyson stated that she took each employee's monthly pay (which is the sum of all the employee's hourly pay, certification pay, education incentive pay, and longevity pay for the month) and multiplied this amount by 12 months to determine a yearly salary. Dyson next divided the yearly salary by 26 to determine the work period salary.

b. Next, determine the regular rate of pay. Dyson stated that she divided the work period salary by 106 (fire suppression employees) or 40 (fire alarm operator employees) to determine the regular rate of pay for each pay period.

c. Next, determine the overtime rate of pay. Dyson testified that she multiplied the regular rate of pay by 1.5 to determine the overtime rate of pay.

d. Next, determine the correct gross pay. Dyson stated that she multiplied the regular rate of pay by the number of regular hours in each work period. Dyson also multiplied the correct overtime rate by the number of overtime hours in each pay period. Dyson then added these two totals together to determine the correct gross pay.

e. Finally, determine the amount owed to each employee. Dyson stated that she subtracted the actual

gross pay that the City paid each employee from the correct gross pay to arrive at the amount the City owed each employee.

f. Dyson stated that she followed these instructions for each Plaintiff for each pay period in Year 1 through Year 5.

17. Having conducted this agreed upon procedure for each Plaintiff in each pay period in Year 1 through Year 5, Dyson prepared a report for each Plaintiff that detailed the difference between the correct gross pay and the actual gross pay in each pay period. Dyson also prepared a summary report for each Plaintiff that reflected the underpayments in Year 1 through Year 5.3

18. Dyson also stated that she ignored any work period in which the City overpaid the employee. Dyson stated that she indicated an overpayment by entering "zero" on the summary sheet for any work period in which there was an overpayment.

19. Dyson cited as an example of the work she performed for each Plaintiff, the report she prepared for Mr. Joe Singer's payroll records.4

20. Dyson stated that she neither audited each Plaintiff's payroll records, nor did she actually verify the data in the accounting summary sheets provided to and prepared for her by Plaintiffs' counsel.

21. Upon review of Dyson's reports, the City noted some discrepancies in the data which Dyson used to prepare her reports. Sonic of these errors were corrected by Dyson, and others were not.

22. Ms. Gail Cross is currently a Financial Supervisor for the City. Cross was promoted to this position on June 1, 2001. Prior to her promotion, Cross was an Internal Auditor for the City. She had served as an Internal Auditor for more than 17 years.

23. As an Internal Auditor, Cross reported directly to the City Director of Budget and Auditing.

24. Although there are no licensing, certification or training requirements to be an internal auditor in the State of Texas, the City required Cross to undergo at least 80 hours of training per year to continue to be an Internal Auditor for the City.

25. Cross stated that during her time as an Internal Auditor, she conducted between one and fifteen audits per year for the City, including some payroll audits.

26. Cross stated that a payroll audit involved primarily the task of verification of time sheet entries, pay histories, service records, and P-sheets.

27. Cross stated that she had never audited the payroll practices of the Waco Fire Department prior to this lawsuit.

28. Cross stated that she conducted an audit of each Plaintiff's payroll records. Cross stated that she verified, for each Plaintiff, the number of hours actually worked in each pay period and the amount of money each Plaintiff actually received for each pay period in Year 1 through Year 5.

29. Cross stated that she did a parallel calculation for each Plaintiffs payroll records. A parallel calculation is the accounting term for "checking your work." Cross

then prepared reports similar to the reports Dyson prepared at the direction of the Plaintiffs.5

30. Cross also prepared reports of her parallel calculation based on a 28-day work period instead of a 14-day work period.6

31. Following the entry of the Court's Findings of Fact and Conclusions of Law, Dyson performed these calculations for the pay periods between August 26, 2000 until August 25, 2001. Dyson summarized these calculations in Appendix B to Defendant's Supplemental Submission of Damage Calculations

32. The Court finds the account summaries prepared by Cross to be more credible than the summaries prepared by Dyson. The Court makes this finding based on Cross's verification of each datum used in the summary she prepared. Dyson merely utilized data that was provided to her by Plaintiffs' counsel.

Any of the foregoing findings of fact which may be more properly considered a conclusion of law shall be so considered.

Conclusions of Law

1. The liability period for a claim made pursuant to Texas Local Government Code, Chapter 142 is the four-year period prior to the filing of the lawsuit. See TEX. Civ. PRAC. & REM. CODE § 16.051.

2. The liability period for a willful FLSA violation period is the three-year period prior to the filing of the lawsuit. See 29 U.S.C. § 255(a).

3. The statute of limitations on the City's counterclaim for unjust enrichment is the four-year period prior to the filing of the lawsuit. See TEX. Civ. PRAC. & REM. CODE § 16.051.

4. Because the jury found that the City established a 14-day work period for its fire suppression employees pursuant to 29 U.S.C. § 207(k), the fire suppression Plaintiffs are not entitled to overtime until after they have worked 106 hours in a given 14-day work period. There are twenty-six 14 - day work periods in each year.

5. The first step in determining the correct overtime pay due to each Fire Suppression Plaintiff is to determine the correct regular hourly rate of pay for each pay period.

6. According to Department of Labor ("DOL") regulations, an employee's regular hourly rate of pay will be calculated by dividing the "work period equivalent wage" by the "number of hours in the work period which the salary is intended to compensate." 29 C.F.R. § 778.113(a) & (b); Secretary of Labor Letter Rulings (Nov. 19, 1986; May 18, 1988).

7. The "work period equivalent wage" is determined by taking an employee's yearly salary and dividing that figure by the number of work periods in each year. 29 C.F.R. §778.113(a)&(b).

8. Once the work period equivalent wage is determined, the next step is to divide the work period equivalent wage by "number of hours in the work period which the salary is intended to compensate." 29 C.F.R. § 718.1 13(a) & (b).

9. The "number of hours in the work period which the salary is intended to compensate" equates to the total number of hours an employee works in the work period. Aaron v. City of Wichita, 54 F.3d 652, 655 (10th Cir. 1995) (Reavley, J.); 29 C.F.R. § 778.325.

10. According to the DOL, a fire suppression employee who is on a rotating schedule of 24 hours on-duty, followed by 48 hours off-duty will work 120 hours in Work Period 1, 120 hours in Work Period 2, and 96 hours in Work Period 3 before the cycle will repeat itself.

11. Thus, it would appear that in Work Periods 1 and 2, the divisor is the total number of hours worked in each work period, ordinarily 120 hours. Since the fire suppression employees are entitled to overtime pay after working 106 hours in each 14-day work period, 14 of the 120 hours in Work Periods 1 and 2 are overtime hours. The fire suppression employees are thus entitled, in Work Periods 1 and 2, to pay at the regular hourly rate for up to 106 hours, and to pay at the overtime rate for any hours actually worked beyond 106 hours.

12. In Work Period 3, the fire suppression employees are entitled to pay at the regular rate for all the hours actually worked in each work period, ordinarily 96 hours.

13. Applying these conclusions to the payroll records of Mr. Singer (as an example only), the Court finds that the summary provided to the Court by the Plaintiffs utilized the incorrect divisor in determining the regular hourly rate of pay under the FLSA. In examining Mr. Singer's payroll records, the Court notes that the work period beginning on October 13, 1996 is equivalent to Work Period 1—Singer was scheduled to work 120

hours. The work period beginning on October 27, 1996 is equivalent to Work Period 2—Singer was again scheduled to work 120 hours. Finally, the work period beginning on November 10, 1996 is equivalent to Work Period 3—Singer was scheduled to work 96 hours.

14. According to the City's payroll records for Singer, he received, during the three work periods mentioned above, a monthly salary of $2,710.10, longevity pay of $60.00, and education certification pay of $50.00. See Plaintiffs' Exhibit 29, Service Record for Joseph Singer.

15. Singer's yearly salary is determined using the following formula: (Monthly Salary + Longevity Pay + Educational Certification Pay) x 12, Mr. Singer's work period equivalent salary is then determined by dividing his yearly salary by the number of work periods in a year. Applying these formulae, Singer's work period equivalent salary $1,301.58.[7]

16. In Work Period 1, Mr. Singer actually worked 4 shifts and called in sick for 1 shift for a total of 120 hours. In Work Period 2, Mr. Singer actually worked 1 shift and took vacation for 4 shifts for a total of 120 hours. Finally, during Work Period 3, Mr. Singer worked four shifts for a total of 96 hours. See Plaintiffs' Exhibit 31, P-Sheets for Joseph Singer.

17. Singer's regular rate of pay for Work Period 1 is determined by dividing the work period equivalent wage by the actual number of hours worked in Work Period 1. Applying this formula, Singer's regular rate of pay for Work Periods 1 and 2 is $11 .168 Singer's regular rate of pay for Work Period 3 is $13.55.9

18. Singer is thus entitled to regular pay of$ 1,182.96 for 106 hours of regular time, and $234.36 for 14 hours of

overtime, for a total of $1,417,32 in Work Period 1.10 In Work Period 2, Singer is entitled to $1,182.96 for 106 hours of regular time, and $234.36 for 14 hours of overtime, for a total of$ 1,417.32 in Work Period 2.11 Singer is entitled to $1,300.80 for 96 hours of regular time in Work Period 3.12 Singer is not entitled to overtime pay in Work Period 3 because he did not work more than 106 hours during the 14-day work period.

19. Examining the check history detail listings for Singer for these three Work Periods indicates that Singer was paid $1,410.72 for Work Period 1, $1,392.17 for Work Period 2; and $1,427.00 in Work Period 3. See Plaintiffs' Exhibit 33, Check History Listing Detail for Joseph Singer.

20. Thus, it appears that Singer was underpaid $6.60 in Work Period 1, underpaid $6.60 in Work Period 2, and overpaid $126.20 in Work Period 3.

21. Plaintiffs calculations for these three Work Periods for Mr. Singer are derived from dividing the work period equivalent wage by 106. Plaintiffs' method of calculating the regular rate of pay improperly inflates the hourly rate of pay because it fails to take into account the number of hours actually worked in each pay period. When an employee works 120 hours in a work period, the regular rate is inflated by using 106 as the divisor in determining the regular rate of pay. Conversely, the regular rate is depressed by using 106 as the divisor when an employee works only 96 hours in a work period.

22. The FLSA requires a fire suppression employee's regular rate of pay for a work period to be determined by utilizing the number of hours actually worked in that

particular work period as the divisor. Aaron, 54 F.3d at 656.

23. The summaries provided by the Plaintiffs in Plaintiffs' Exhibit 48 are inherently flawed in this respect, and are therefore insufficient proof of Plaintiffs' damages for the City's willful violation of the FLSA.

24. The summaries provided by the City, however, have utilized the actual hours worked in the work period as the divisor, and the Court's conclusions are based upon these summaries.13

25. The City has also raised the issue of whether it is entitled to offset overpayments made in one pay period against underpayments made in other pay periods.

26. The Court concludes that permitting the Plaintiffs to receive a windfall by not taking into account the City's overpayment would result in unjust enrichment. The purpose of the FLSA is to put the Plaintiffs back into the position they would have been had their pay been correctly calculated. Plaintiffs should not be permitted to profit from the City's error. Plaintiffs are merely entitled to be made whole. The City is liable, however, for liquidated damages in those pay periods in which the Plaintiffs were underpaid because of the jury's finding that the City did not have a good faith and reasonable belief that its pay calculations did not violate the FLSA. Therefore, the amount, rather than the FLSA underpayment amount.

27. The amount of total damages for each Plaintiff should be determined by first determining the amount of underpayments due under the FLSA, and then assessing the liquidated damage requirement of the FLSA, and adding the amount of underpayments due under the

Texas Local Government Code. Only then should the overpayments made by the City during the four years prior to the filing of the lawsuit be offset against the total damages amount.

28. Attached to these amended findings of fact and conclusions of law is a summary of each fire suppression Plaintiffs damages under the FLSA and the Texas Local Government Code ("Amended Exhibit A"). Amended Exhibit A is a spreadsheet which reflects the outcome of the above listed calculations as they were applied to each Fire Suppression Plaintiff for each work period from October 1, 1995 until August 25, 2001. The Court incorporates by reference Amended Exhibit A verbatim as if set out at length into these amended findings and conclusions.

Fire Alarm Operator Plaintiffs

29. The fire alarm operator employees are entitled to overtime after having worked 40 hours in a given 7-day work week. There are fifty-two 7-day work weeks in each year.

30. According to Department of Labor ("DOL") regulations, an employee's regular hourly rate of pay will be calculated by dividing the "work week equivalent wage" by the "number of hours in the work period which the salary is intended to compensate." 29 C.F.R. § 778.113(a) & (b); Secretary of Labor Letter Rulings (Nov. 19, 1986; May 18, 1988).

31. The "work week equivalent wage" is determined by taking an employee's yearly salary and dividing that figure by the number of work weeks in each year. 29 C.F.R. §778.113(a)&(b).

32. The next step in determining the correct overtime pay due to each Fire Alarm Operator Plaintiff is to determine the correct regular hourly rate of pay for each work week.

33. The regular rate of pay for employees not covered by section 207(k) of the FLSA is determined by dividing the first 40 hours worked into the total wages paid for those 40 hours. Lee v. Coahoma County, 937 F.2d 220, 224-25 (5th Cir. 1991), corrected at 37 F.3d 1068 (5th Cir. 1993); 29 C.F.R. §§ 553.233,778.107 and 778.113.

34. The overtime rate is then 1 1/2 times the regular rate of pay for all hours beyond 40 worked in. a seven-day work week.

35. Applying these conclusions to the payroll records of Mr. Charles Lindorfer, as an example only, the Court notes that Mr. Lindorfer's monthly salary was $3,133.00. He was paid $16.00 in longevity pay for a total monthly pay of $3,149.00. Mr. Lindorfer's yearly salary is thus $37,788.00. Dividing his yearly salary by the number of work weeks in each year, Mr. Lindorfer's weekly salary is $726.69. This figure represents the the total wages paid for the first 40 hours Mr. Lindorfer works each week. Thus, the hourly rate of pay is $18.17 and the overtime rate of pay is $27.26.

36. Mr. Lindorfer worked 48 hours (four 12-hour shifts) in the seven-day work week that began on March 2, 1991. Mr. Lindorfer also worked 48 hours in the work week that began on March 9, 1997. Mr. Lindorfer is entitled to 8 hours of overtime pay in week one, and 8 hours of overtime pay in week two.

37. Thus, Mr. Lindorfer is entitled to $726.80 in regular pay for each of the two weeks, and $218.08 in overtime pay for each of the two weeks, for a two work-week total of $ 1,889.76.

38. During the two weeks that began on March 2, 1997 and ended on March 15, 1997, Mr. Lindorfer was paid $1,537.54. Thus, Mr. Lindorfer was underpaid during these two work weeks a total of $352.22.

39. Attached to these amended findings of fact and conclusions of law is a summary of each fire alarm operator Plaintiff's damages under the FLSA and the Texas Local Government Code ("Amended Exhibit B"). Amended Exhibit B is a spreadsheet which reflects the outcome of the above listed calculations as they were applied to each Fire Alarm Operator Plaintiff for each work week from October 1, 1995 until August 25, 2001. The Court incorporates by reference Amended Exhibit B verbatim as if set out at length into these amended findings and conclusions.

Any of the foregoing conclusions of law which may be more properly considered as a finding of fact shall be so considered. In light of these findings of fact and conclusions of law, it is

ORDERED that Judgment he entered in favor of Plaintiffs. It is further

ORDERED that Defendant City of Waco, Texas pay each Plaintiff money damages as more fully described in Amended Exhibits A and B.

SIGNED this 14th day of September 2001.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

FOOTNOTES

[1] The Court entered its findings of fact and conclusions of law regarding money damages due under the FLSA and Texas Local Government Code, Chapter 142 on August 24, 2001. At that time the Court instructed the City to submit payroll records **for** each Plaintiff for each pay period between August 26, 2000 and August 25, 2001. The City has made its submission arid these amended findings of fact and conclusions **of** law reflect Plaintiffs' damages between October 1, 1995 and August 25, 2001.

[2] See Plaintiffs' Exhibit 44.

[3] See Plaintiffs' Exhibit 48.

[4] See Plaintiffs' Exhibit 49.

[5] See Defendant's Exhibits 1 - 4.

[6] See Defendant's Exhibits 5 - 8. Defendant offered these reports merely as an offer of proof in order to preserve its argument that the City conclusively established a 28-day work period pursuant to section 207(k) when Chief Mercer's Memorandum was circulated in 1985.
Fire Suppression Plaintiffs

[7] [($2,791.01 + 60.00 + 50.00) x 12] + 26 $1,338.93.

[8] 1,338.93 + 120 = $11.16.

[9] $1,338.93 + 96 = $I3.55.

[10] ($11.16 x 106) + (1.5 x $11.16 x 14) = $1,417.32.

[11] ($11.16 x 106) + (1.5 x $11.16 x 14) = $1,417.32.

[12] $13.55 x 96 $1,300.80.

[13] See Appendix 1 to Defendant's Brief Regarding Damages; Defendant's Damagcs Exhibits 3 & 4; Appendix B and Appendix D to Defendant's Supplemental Submission of Damages Calculations.

CIVIL ACTION NO. W-99-CA-296

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

JOSEPH SINGER and CHARLES LINDORFER,
Individually and on Behalf of Others Similarly Situated,
Plaintiffs,

v.

CITY OF WACO, TEXAS,
Defendant.

ORDER

Before the Court is the Plaintiffs' motion to amend the Court's findings of fact and conclusions of law entered on September 14,2001. The Plaintiffs urge the Court to correct several findings of fact, and numerous conclusions of law. The requested amendments to the Court's conclusions of law would amount to a wholesale abandonment of the Court's conclusions regarding damages. The requested amendments to the factual findings, however, correct typographical or clerical errors. Having reviewed the Plaintiffs' requests, the Court finds that they should be GRANTED IN PART and DENIED IN PART.

Plaintiffs' first request is to include a "missing" plaintiff in the Court's findings regarding damages. Plaintiff W.C. Monroe is a proper plaintiff, and the Court should have included findings regarding Mr. Monroe's damages in Amended Exhibit A attached to the Court's Amended Findings of Fact and Conclusions of Law. Therefore, the Court finds that Amended Exhibit A, should be further

amended to include findings regarding the damages of Plaintiff W.C. Monroe. The Court incorporates by reference the attached Second Amended Exhibit A verbatim as if set out at length into the Court's amended findings and conclusions regarding damages.

Plaintiffs' second request relates to Findings of Fact Nos. 31 and 32. Plaintiffs point out that the Court erroneously refers to the Defendant's expert witness, Ms. Cross, as Ms. Dyson, the Plaintiffs' expert witness. Plaintiffs' also complain that the Court's credibility determination regarding the calculations of the Plaintiffs' damages is incorrect. The Court believes that the method which Ms. Cross utilized in making her calculation—personal verification of the data on the Plaintiffs' employment records — as opposed the method Ms. Dyson utilized — reliance upon data provided by Plaintiffs' counsel, albeit derived from the Plaintiffs employment records — to be more reliable and credible. Accordingly, the Court finds that Findings of Fact Nos. 31 and 32 should be amended as follows:

31. Following the entry of the Court's Findings of Fact and Conclusions of Law, Cross performed these calculations for the pay periods between August 26, 2000 until August 25, 2001. Cross summarized these calculations in Appendix B to Defendant's Supplemental Submission of Damage Calculations.

32. The Court finds the account summaries prepared by Cross to be more credible than the summaries prepared by Dyson. The Court makes this findings based on Cross's verification of each datum used in the summary she prepared. Dyson merely utilized data that was provided to her by Plaintiffs' counsel.

Plaintiffs' third request relates to the Court's conclusion regarding the proper formula to use in determining the Plaintiffs regular rate of pay for each work period. This issue has been continuously litigated in this Court for more than one year. The briefing has been extensive and detailed. The Court is not inclined to reconsider its conclusions regarding the proper method of calculating the regular rate of pay for the Plaintiffs.

Plaintiffs' fourth request relates to the Court's conclusion regarding the issue of offset of overpayments made in some work periods against underpayments in other work periods. The Court's conclusion is properly characterized as a conclusion based in equity. The Court concluded that Plaintiffs would be unjustly enriched if the City's overpayments are not taken into account in any manner whatsoever, as the Plaintiffs desire. All the parties agree that the City incorrectly paid its firefighters. All the parties agree that the City paid its firefighters the same salary for each pay period regardless of the number of hours actually worked in that work period. The simple fact remains that Plaintiffs were overpaid during some of these pay periods. Failure to take some account of these overpayments would be inconsistent with the purposes of the FLSA — to put the Plaintiffs in the same position they would have been had they been paid correctly. The offset does not confer a benefit on the City because the Court's conclusions applied the liquidated damage requirement of the FLSA to the underpayment prior to making the offset. To argue that the FLSA prevents the Court from taking into account the overpayment, misconstrues the Court's conclusion. The offset determination made by the Court was clearly based in equity, and not the strictures of the FLSA.

Plaintiffs' fifth request objects to the Court's consideration of evidence presented by Defendant following entry of the Court's Findings of Fact and Conclusions of Law Regarding Damages on August 24, 2001. Defendant introduced at the hearing on damages a summary of calculations made by Ms. Cross. Plaintiff had an opportunity to cross examine Ms. Cross on the accuracy of the calculations she performed and which were summarized in the Defendant's exhibits. The detail of the summaries provided by Defendant were used by the Court to verify the accuracy of the data reflected in the Defendant's exhibit. Moreover, the data utilized in the Court's Amended Findings of Fact and Conclusions of Law Regarding Damages entered on September 14, 2001 was derived from the summaries provided by the Defendant at the hearing.

Plaintiffs' final request relates to the Fire Alarm Operator Plaintiffs, and essentially argues that the Court's conclusions regarding these plaintiffs' damages are incorrectly based upon a 14-day, 80 hour work period instead of a 7-day, 40-hour work week. Plaintiffs also complain that the Court improperly permitted an offset of overpayments made by the City. For the same reasons as cited above the Court is not inclined to reconsider these conclusions.

Accordingly, it is

ORDERED that Findings of Fact Nos. 31 and 32 in the Court's Amended Findings of Fact and Conclusions of Law Regarding Damages entered on September 14, 2001 be AMENDED as described above. It is further

ORDERED that the Court's Second Amended Exhibit A be incorporated by reference into the Court's Amended Findings of Fact and Conclusions of Law Regarding

Damages entered on September 14, 2001 in the place of Amended Exhibit A. It is further

ORDERED that the balance of plaintiffs' motion to amend the Court's findings of fact and conclusions of law is DENIED.

SIGNED this 25th day of October 2001.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
NOV 20 2003
OFFICE OF THE CLERK

No. 03-595

In The Supreme Court of the United States

JOSEPH SINGER, Individually and on Behalf of Others Similarly Situated; CHARLES LINDORFER, Individually, and on Behalf of Others Similarly Situated; ROSALIO AMARO; CARL B. AMMANN; JAMES A. BAKER; ET AL.,

Petitioners,

v.

THE CITY OF WACO, TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LU PHAM
Counsel of Record
BETTYE LYNN
LYNN PHAM MOORE & ROSS, PC
1320 S. University Drive,
Suite 720
Fort Worth, Texas 76107
(817) 332-8505

KAREN S. PRECELLA
HAYNES AND BOONE, LLP
201 Main Street,
Suite 2200
Fort Worth, Texas 76102
(817) 347-6600

ARTHUR PERTILE, III
City Attorney
City of Waco, Texas
P.O. Box 2570
Waco, Texas 76702
(254) 750-5680

Counsel for Respondent, The City of Waco, Texas

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. The Fair Labor Standards Act gives courts broad powers to fashion legal and equitable remedies in order to assure that plaintiffs/employees are adequately compensated. 29 U.S.C. §216(b). The first question presented is:

   > Whether the FLSA allows courts the power to fashion an equitable remedy that does not result in a windfall to Petitioners by allowing overpayments made in some work periods to offset underpayments made in other work periods?

2. The Department of Labor regulations expressly state that the regular hourly rate of pay of an employee is determined by dividing the employee's total remuneration for employment in any work period by the total number of hours *actually worked* by the employee during that work period. 29 C.F.R. §778.109. The second question presented is:

   > Whether Petitioners' hourly rate of pay is properly calculated by dividing their work period salary by the total number of hours actually worked, including overtime hours, in the work period?

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BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

Respondent, the City of Waco, Texas, presents this Brief in Opposition to the Petition for Writ of Certiorari by Joseph Singer, Charles Lindorfer, and 178 other individually named members of the Waco Fire Department ("Petitioners"), and respectfully requests that this Court deny Petitioners' Writ of Certiorari.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Fair Labor Standards Act, 29 U.S.C. §§201, *et seq.*, the regulations promulgated relative thereto by the Department of Labor ("DOL"), and the Texas Constitution.

The following are pertinent constitutional, statutory, and regulatory provisions to Respondent's Brief in Opposition:

Article III, Section 53 of the Texas Constitution

> The Legislature shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into, and performed in whole or in part; nor pay, nor authorize the payment of, any claim created against any county or municipality of the State, under any agreement or contract, made without authority of law.

29 U.S.C. §216(b). Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become

a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which

(1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefore under the provisions of this subsection or

(2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

29 C.F.R. §778.109. The regular rate is an hourly rate.

The "regular rate" under the Act is a rate per hour. The Act does not require employers to compensate employees on an hourly rate basis; their earnings may be determined on a piece-rate, salary, commission, or other basis, but in such case the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek, with certain statutory exceptions discussed in §§778.400 through 778.421. The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid. The following sections give some examples of the

proper method of determining the regular rate of pay in particular instances: (The maximum hours standard used in these examples is 40 hours in a workweek).

STATEMENT OF THE CASE

This is a wage dispute brought as a collective "opt-in" action under Section 216(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. Petitioners are Joseph Singer, Charles Lindorfer, and other similarly situated fire suppression and fire alarm (or dispatch) employees of the City of Waco Fire Department. Petitioners are non-exempt employees under the FLSA. During the time period at issue, Respondent paid Petitioners on an annual salary basis. (Pet. App. 3a).

Fire suppression employees worked 24-hour shifts every third day; that is, they would work 24 hours, then be off work for 48 hours. (Pet. App. 3a, 43a). Respondent paid fire suppression employees every 14 days. (*Id.*). Based on the 24-hour shift schedule, fire suppression employees worked 120 hours in one 14-day period, 120 hours in the next 14-day period, and 96 hours in the third 14-day pay period, with the cycle repeating itself. (*Id.*). Despite the variance in the number of hours Respondent scheduled fire suppression employees to work during each pay period, Respondent paid them a fixed salary representing 106 hours straight time, and six hours of scheduled overtime at a rate of one and one-half times their regular rate of pay (for a total of 112 hours) each 14-day pay period. (*Id.*).

To determine the "regular rate of pay" of fire suppression employees for purposes of calculating their overtime rate, Respondent took the employee's annual salary and divided it by 2,912. (Pet. App. 3a). This represented a three year average number of work hours, including scheduled overtime, a fire suppression employee worked during a year because of the varying numbers of hours they worked per 14-day pay period (*i.e.*, 120/120/96). Respondent's method of paying a fixed sum for 106 hours of straight time and six hours overtime every 14-day pay period resulted in *overpayments* to fire suppression employees in those pay periods in which they worked only 96 hours, and underpayments when they worked 120 hours. (Pet. App. 3a, 43a).

Petitioners filed suit against the City of Waco and asserted that Respondent had miscalculated their "regular rate of pay" for purposes of determining overtime pay. (Pet. App. 3a). Respondent counterclaimed and maintained it overpaid Petitioners, thus, it was entitled to a credit for any overpayment of wages to Petitioners. Additionally, Respondent asserted in its counterclaim against Petitioners that it was entitled to a refund for the excess wages paid to the Petitioners. A bifurcated trial was held, with the issue of liability under the FLSA decided by the jury and the amount of damages determined by the District Court. The jury determined that Respondent had established a 14-day work period, rather than a 28-day work period, under the FLSA's §207(k) exemption. (Pet. App. 6a). The District Court held, *inter alia*, that the proper method of calculating the hourly rate of pay for purposes of determining overtime pay was to divide the fire suppression employees' work period salary by the total number of

hours actually worked in each 14-day work period. (Pet. App. 16a, 45a-46a). The District Court also credited overpayments made by Respondent every third pay period against underpayments made in the other two pay periods. (Pet. App. 19a, 46a). The Fifth Circuit Court of Appeals *affirmed* the District Court's decision. (Pet. App. 25a).

Petitioners now appeal to this Court, asserting that the proper method of calculating an hourly rate of pay is determined by dividing the work period salary into the non-overtime hours worked, as opposed to the actual hours worked, including overtime hours. Additionally, Petitioners assert that overpayments made by Respondent every third work period (*i.e.*, the period where Petitioners worked 96 hours but Respondent paid them for 106 hours of straight time and six hours of overtime) should not be applied to underpayments in the other two work periods (*i.e.*, the periods where Petitioners worked 120 hours but Respondent paid them only for 106 hours of straight time and six hours of overtime).

REASONS TO DENY THE WRIT

I. The Broad, Equitable Powers Conferred By The FLSA Allow Courts To Fashion A Remedy That Does Not Result In A Windfall To Petitioners.

Petitioners complain that the District Court and the Fifth Circuit Court of Appeals panel erred when they credited overpayments made by Respondent against Petitioners' damages for unpaid overtime. Petitioners contend that an employer's entitlement to a credit or offset for overpayments are limited to those described by §207(e)

of the FLSA, and may be applied to damages for unpaid overtime arising only during work periods in which the overpayments occurred.

Petitioners' argument misses the point. Section 216(b) of the FLSA gives courts broad powers to fashion legal and equitable remedies in order to assure that FLSA plaintiffs are adequately compensated. On the other hand, the courts may fashion a money judgment that does not result in a windfall for plaintiffs. Accordingly, FLSA defendants may be credited for overpayments of wages without regard to the work period in which the overpayments occurred. *See Kohleim v. Glynn County, GA,* 915 F.2d 1473, 1481 (11th Cir. 1990); *Abby v. City of Jackson,* 883 F. Supp. 181, 186-87 (E.D. Mich. 1995).[1]

Likewise, Respondent is entitled to a credit for overpayments it made to Petitioners. It is abundantly clear that Respondent paid Petitioners extra compensation as pre-payments, so as to avoid uneven paychecks. Significantly, the FLSA does *not* prohibit employers from prepaying its employees.

Plaintiffs also argue that the Fifth Circuit Court of Appeals' decision affirming the offset in damages is in direct conflict with the Fourth Circuit's decision in *Roland Electrical Co. v. Black* 163 F.2d 417 (4th Cir. 1947), *cert. denied,* 333 U.S. 854, 68 S.Ct. 729, 92 L.Ed. 1135 (1948). However, Petitioners inaccurately rely on *Roland Electrical,* as it can easily be distinguished from the facts in this

[1] The cases upon which Plaintiffs rely on this issue are distinguishable because they specifically involve payments made under § 207(e) of the FLSA.

case. In *Roland Electrical,* the employer sought to offset premium pay for undesirable hours against overtime liability for hours worked in excess of the statutory maximum. The Fourth Circuit disallowed this practice because the premium pay was not intended to be compensation for the overtime mandated by the FLSA. *Roland Electrical, supra,* at 420-421. Specifically, the Fourth Circuit stated, "[the payments] were paid as compensation for services previously rendered in order to allow the employees to share in the profits of the business and to incite them to further efforts in the company's behalf." *Id.* at 421.[2]

This case differs from *Roland Electrical* in that it involves premium payments, which are extra payments for work performed and the crediting of the premium pay to offset damages. Respondent made no such premium payments. Rather, the overpayments received by Petitioners were intended as payment for overtime, not as bonuses to Petitioners. Section 53 of the Texas Constitution prohibits its municipalities from making bonus payments to its employees. Therefore, *Roland Electrical* does not control the issue at hand. Accordingly, the District Court and the Fifth Circuit Court of Appeals did not err by allowing Respondent to offset *all* overpayments it was owed.

Finally, Petitioners argue that Respondent failed to properly establish a pre-payment schedule. However, Petitioners' argument is again misplaced. Even if the Court were to find that Respondent failed to properly

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[2] Furthermore, *Roland Electrical* was decided before §207(h) was enacted in 1949, and thus the Fourth Circuit did not address the issue of crediting.

establish a pre-payment plan, such failure should not result in a windfall for Petitioners.

Not only is such a windfall disfavored by the FLSA, but it is also expressly prohibited by the Texas Constitution. Article III, Section 53 of the Texas Constitution provides:

> The Legislature shall have *no* power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into, and performed in whole or in part; nor pay, nor authorize the payment of, any claim created against any county or municipality of the State, under any agreement or contract, made without authority of law.

TEX. CONST. ART. III §53 (emphasis added). Because the City of Waco is a municipality and is prohibited from making bonus payments, gifts, or other excess payments to employees, Petitioners must return all overpayments.

The FLSA does not state that only payments enumerated in 29 U.S.C. §207(e)(5), (6), and (7) may be credited toward overtime owed. Therefore, without any statutory provision disallowing a credit for pre-payments, Respondent is entitled to offset any payment of overtime owed to Petitioners with the pre-payments it made to Petitioners. To disallow an offset would work an injustice to the citizens of Waco and give Petitioners an unjustified windfall. Indeed, the District Court expressly held that:

> "failure to take some account of these overpayments would be inconsistent with the purposes of the FLSA – to put the (Petitioners) in the same position they would have been had they been

> paid correctly. . . . To argue that the FLSA prevents the Court from taking into account the overpayment misconstrues the Court's conclusion. The offset determination made by the District Court was clearly based in equity, and not the strictures of the FLSA." (Pet. App. 54a).

II. An Employee's Hourly Rate Is Properly Calculated By Dividing The Work Period Salary By The Total Number Of Hours *Actually Worked*, Including Overtime Hours, During The Work Period.

The Department of Labor (DOL) regulations state that a regular rate of pay for employees paid on a salary basis "must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek. . . . " 29 C.F.R. §778.109. Section 778.109 also states that the hourly rate must be calculated by dividing the work period salary by the total number of hours *actually worked* in the work period, including overtime hours:

> The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek[3] by the total number of hours *actually worked* by him in that workweek for which such compensation was paid.

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[3] The rules for computing an employee's "regular rate" of pay are applicable to employees for whom the Section 7(k) exemption is claimed. However, wherever the word "workweek" is used, the words "work period" should be substituted. 29 C.F.R. §553.233.

29 C.F.R. § 778.109 (emphasis added). Accordingly, the DOL regulations contemplate a different hourly rate when employees are paid a salary, but work a different number of hours each work period.

Petitioners complain that the factual circumstances of this case do not meet the criteria set forth in the DOL regulations governing fixed salary for fluctuating work period arrangements. 29 C.F.R. §778.114. Petitioners' argument is again misplaced, because the fluctuating work period regulation allows employers to pay overtime at a half-time rate, as opposed to a rate of one and one-half times the regular rate of pay. 29 C.F.R. §778.114. However, there is no dispute that Respondent has always calculated overtime at a rate that is one and one-half times the regular rate of pay. Since the issue is *how* an hourly rate is calculated (as opposed to whether the half-time method of paying overtime), §778.109 governs this matter, as discussed above. 29 C.F.R. §778.109.

Petitioners erroneously rely on *Lee v. Coahoma County, Miss.* for the proposition that hourly rates are determined by dividing the work period salary by the non-overtime hours worked. *Lee v. Coahoma County, Miss.*, 937 F.2d 220 (5th Cir. 1991), *corrected by Lee v. Coahoma County, Miss.*, 37 F.3d 1068 (5th Cir. 1993). Petitioners' position is supported only by a stretched reading of the language articulated by the *Coahoma County* opinion:

> In determining each deputy's hourly wage in a given work period . . . the court should divide the [work period salary] by the number of *regular hours* which may be worked in that work period according to 29 C.F.R. § 553.233. This will result in a determination of each deputy's appropriate

> hourly wage in the work period determined by the district court.

Id. at 1069 (emphasis added).

The Fifth Circuit Court of Appeals properly stated that Petitioners misconstrued the term "regular hours," to mean "non-overtime hours." (Pet. App. 17a). Accordingly, work period salaries should be divided by the total number of regularly assigned hours, including scheduled overtime hours.

Furthermore, *Coahoma County* does *not* control the issue presented with respect to the formula for "regular rate of pay." The parties in *Coahoma County* did not present to the Fifth Circuit Court of Appeals the question of whether regularly scheduled overtime hours worked during a salaried employee's work period should be used in determining the "regular rate of pay." Thus, contrary to Petitioners' assertion, the Fifth Circuit Court of Appeals did not disregard its prior holding in *Coahoma County*.

Contrary to Petitioners' argument, the *York v. Wichita Falls* cases hold that the regular rate of pay is determined by dividing the work period salary into the total hours worked, including overtime hours. *York v. City of Wichita Falls*, 856 F.Supp. 1191 (N.D. Tex. 1994); *York v. City of Wichita Falls*, 48 F.3d 919 (5th Cir. 1995). The *York* plaintiffs objected to the City of Wichita Falls' use of an artificial regular rate of pay for overtime calculations,[4] and

[4] The City of Wichita Falls recalculated wages to lower the hourly rate such that fire fighters were paid exactly the same level of annual compensation for regularly scheduled hours. *York v. City of Wichita Falls*, 48 F.3d at 922, n. 17 (5th Cir. 1995).

maintained that the City should have determined a fire fighter's regular rate of pay by dividing his annual salary by his regularly scheduled hours, including overtime hours. *York v. City of Wichita Falls*, 856 F.Supp. at 1201; *York v. City of Wichita Falls*, 48 F.3d at 922. Both the Northern District of Texas and the Fifth Circuit Court of Appeals held that the *York* plaintiffs' argument was valid under 29 U.S.C. §207 and 29 C.F.R. §§ 778.107-109 as codified **today** (*i.e.*, after April 15, 1986). *York*, 856 F.Supp at 1201; 48 F.3d at 922 (emphasis in original). Thus, the Fifth Circuit Court of Appeals has consistently held that where an employee is paid on a salary basis, the regular hourly rate of pay is computed by dividing the salary by the number of hours worked, including overtime hours.[5]

CONCLUSION AND PRAYER FOR RELIEF

Respondent respectfully requests that the Court deny Petitioners' Writ of Certiorari with respect to the formula for determining Petitioners' "regular rate" of pay and with

[5] As an alternative, Petitioners assert that the regular rate of pay should be determined by dividing the work period salary by the number of hours they were ***scheduled*** to work, including scheduled overtime hours, but not unscheduled overtime. However, Petitioners neglected to present at trial any damage calculation based on this formula. (Pet. App. 39a)

respect to the exercise of equitable powers to offset overpayment against underpayment of wages.

Respectfully submitted,

LU PHAM
Counsel of Record
Texas Bar No. 15895430
BETTYE LYNN
Texas Bar No. 11540500
LYNN PHAM MOORE & ROSS, PC
1320 S. University Drive,
Suite 720
Fort Worth, Texas 76107
Telephone: 817.332.8505
Telecopy: 817.332.8548

KAREN S. PRECELLA
Texas Bar No. 16245550
HAYNES AND BOONE, LLP
201 Main Street
Fort Worth, Texas 76102
Telephone: 817.347.6600
Telecopy: 817.347.6650

ARTHUR PERTILE, III
Texas Bar No. 15815200
City Attorney
City of Waco, Texas
P.O. Box 2570
Waco, Texas 76702
Telephone: 254.750.5680
Telecopy: 254.750.5880

Attorneys for Respondent,
the City of Waco, Texas